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VOLUME 484

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1987

BEGINNING OF TERM

OCTOBER 5, 1987, THROUGH FEBRUARY 23, 1988

FRANK D. WAGNER

REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1990

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS*

WILLIAM H. REHNQUIST, CHIEF JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.
ANTONIN SCALIA, ASSOCIATE JUSTICE.
ANTHONY M. KENNEDY, ASSOCIATE JUSTICE.[1]

RETIRED

WARREN E. BURGER, CHIEF JUSTICE.
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.[2]

OFFICERS OF THE COURT

EDWIN MEESE III, ATTORNEY GENERAL.
CHARLES FRIED, SOLICITOR GENERAL.
JOSEPH F. SPANIOL, JR., CLERK.
FRANK D. WAGNER, REPORTER OF DECISIONS.
ALFRED WONG, MARSHAL.
STEPHEN G. MARGETON, LIBRARIAN.

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*For notes, see p. IV.

NOTES

[1] The Honorable Anthony M. Kennedy, of California, formerly a Judge of the United States Court of Appeals for the Ninth Circuit, was nominated by President Reagan on November 24, 1987, to be an Associate Justice of this Court; the nomination was confirmed by the Senate on February 3, 1988; he was commissioned on February 11, 1988; and he took the oaths and his seat on February 18, 1988. See also *post*, p. XI.

[2] Justice Powell retired on June 26, 1987. See *post*, p. IX.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES*

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.[1]

For the Sixth Circuit, ANTONIN SCALIA, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.[2]

For the Federal Circuit, WILLIAM H. REHNQUIST, Chief Justice.

October 6, 1986.

(For temporary modifications of above allotment, see 479 U. S., p. V, and 483 U. S., pp. V, VI.)

(For next previous allotment, and modifications, see 453 U. S., p. VI, 459 U. S., p. IV, and 478 U. S., p. V.)

(For next subsequent allotment, see *post*, p. VII.)

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*For notes, see p. VI.

NOTES

[1] For order of October 5, 1987, vacating the order of July 31, 1987 [483 U. S. 1041], assigning THE CHIEF JUSTICE to the Fifth Circuit, see *post*, p. 891.

[2] For order of December 1, 1987, assigning JUSTICE STEVENS to the Eleventh Circuit and vacating the order of September 10, 1987 [483 U. S. 1053], which assigned JUSTICE O'CONNOR to that Circuit, see *post*, p. 972.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective February 18, 1988, *viz.*:

For the District of Columbia Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, ANTONIN SCALIA, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Federal Circuit, WILLIAM H. REHNQUIST, Chief Justice.

February 18, 1988.

(For next previous allotment, and modifications, see 479 U. S., p. V, 483 U. S., pp. V, VI, and *ante*, pp. V, VI.)

RETIREMENT OF JUSTICE POWELL

SUPREME COURT OF THE UNITED STATES

MONDAY, OCTOBER 5, 1987

Present: CHIEF JUSTICE REHNQUIST, JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, JUSTICE STEVENS, JUSTICE O'CONNOR, and JUSTICE SCALIA.

THE CHIEF JUSTICE said:

Before I call the first case for argument, I would like to make a part of the record of this Court an exchange of correspondence between the Court and Justice Powell upon his retirement. Our letter to Justice Powell which is signed by his eight colleagues and his response will be made a part of the Journal of today's proceedings.

Our letter to Justice Powell reads as follows:

SUPREME COURT OF THE UNITED STATES,
CHAMBERS OF THE CHIEF JUSTICE,
Washington, D. C., June 29, 1987.

Dear Lewis:

You know without our telling you again how saddened we are by your departure from our ranks. For more than fifteen years we have benefited from your wise and careful marshaling of arguments in Conference, and from your shouldering Term after Term of more than your share of the Court's opinion writing. All of us admire your extraordinary capacity to forcefully participate in our private and public debates without ever allowing advocacy to degenerate into contentiousness.

Your career in the legal profession before coming here was replete with laurels. Thirty years of successful law practice,

wartime service overseas in Air Force Intelligence, President of the American Bar Association, President of the Richmond School Board were but some of your accomplishments. The lessons from a life so rich in experience informed your judgment as a member of the Court.

We bid you a fond farewell as you retire from this last arena in which you have served your profession and served your country. We are grateful for, and look forward to, the prospect of your continued companionship in the future.

Affectionately,

WILLIAM H. REHNQUIST
WILLIAM J. BRENNAN, JR.
BYRON R. WHITE
THURGOOD MARSHALL
HARRY A. BLACKMUN
JOHN PAUL STEVENS
SANDRA O'CONNOR
ANTONIN SCALIA

Justice Powell's response reads as follows:

SUPREME COURT OF THE UNITED STATES,
CHAMBERS OF JUSTICE LEWIS F. POWELL, JR.; *(Retired)*
Washington, D. C., July 10, 1987.

Dear Colleagues:

Your gracious letter of June 29 was forwarded to me here in Richmond. It is a letter I am proud to share with Jo and our children, and one I shall always treasure.

I can add little to what I said in my statement of June 26. I do leave the Court with a considerable measure of sadness. I have been privileged to serve on a strong Court, and also I have cherished the friendship I have shared with each of you. This, of course, will continue although I will miss more than I can say the day to day participation in the work of the Court.

With admiration and affection for each of you.

Sincerely,

LEWIS F. POWELL

APPOINTMENT OF JUSTICE KENNEDY

SUPREME COURT OF THE UNITED STATES

THURSDAY, FEBRUARY 18, 1988

Present: CHIEF JUSTICE REHNQUIST, JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE BLACKMUN, JUSTICE STEVENS, JUSTICE O'CONNOR, and JUSTICE SCALIA.

THE CHIEF JUSTICE said:

This special sitting of the Court is held today to receive the commission of the newly appointed Associate Justice of the United States, Anthony M. Kennedy. The Court now recognizes the Attorney General of the United States. Mr. Meese.

The Attorney General said:

MR. CHIEF JUSTICE and may it please the Court, I have the commission which has been issued to the Honorable Anthony M. Kennedy as an Associate Justice of the Supreme Court of the United States. The commission has been duly signed by the President of the United States and attested by me as the Attorney General of the United States. I move that the Clerk read the commission and that it be made part of the permanent records of this Court.

THE CHIEF JUSTICE said:

Thank you Mr. Attorney General; your motion is granted. Mr. Clerk, will you please read the commission?

The Clerk then read the commission as follows:

RONALD REAGAN,

PRESIDENT OF THE UNITED STATES OF AMERICA,

To all who shall see these Presents, Greeting:

KNOW YE; That reposing special trust and confidence in the Wisdom, Uprightness, and Learning of Anthony M. Kennedy, of California, I have nominated, and, by and with the advice and consent of the Senate, do appoint him as Associate Justice of the Supreme Court of the United States and do authorize and empower him to execute and fulfill the duties of that Office according to the Constitution and Laws of the said United States, and to Have and to Hold the said Office, with all the powers, privileges and emoluments to the same of right appertaining, unto Him, the said Anthony M. Kennedy, during his good behavior.

In testimony whereof, I have caused these Letters to be made patent and the seal of the Department of Justice to be hereunto affixed.

Done at the City of Washington, this eleventh day of February, in the year of our Lord one thousand nine hundred and eighty-eight, and of the Independence of the United States of America the two hundred and twelfth.

[SEAL] RONALD REAGAN

By the President:

EDWIN MEESE, III,

Attorney General

THE CHIEF JUSTICE said:

I now ask the Deputy Marshall of the Court to escort Judge Kennedy to the center of the bench.

THE CHIEF JUSTICE said:

Judge Kennedy, are you prepared to take the oath?

Judge Kennedy said:

I am.

I, Anthony M. Kennedy, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as Associate Justice of the Supreme Court of the United States according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States; that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office of which I am about to enter.

So help me God.

ANTHONY M. KENNEDY

Subscribed and sworn to before me this eighteenth day of February, 1988.

WILLIAM H. REHNQUIST,
Chief Justice

THE CHIEF JUSTICE said:

JUSTICE KENNEDY, on behalf of all the members of the Court, it is a pleasure to extend to you a very warm welcome as an Associate Justice of this Court and to wish for you a very long life and a long and happy career in our common calling.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1987

REAGAN, PRESIDENT OF THE UNITED STATES, ET AL. *v.* ABOUREZK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86–656. Argued October 5, 1987—Decided October 19, 1987

251 U. S. App. D. C. 355, 785 F. 2d 1043, affirmed by an equally divided Court.

Deputy Solicitor General Wallace argued the cause for petitioners. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Willard, Roger Clegg, Michael Jay Singer,* and *Abraham D. Sofaer.*

Steven R. Shapiro argued the cause for respondents. With him on the brief were *Arthur N. Eisenberg, John A. Powell, Charles S. Sims, Peter L. Zimroth, Michael D. Young,* and *Leonard Boudin.**

**Daniel J. Popeo* and *Paul D. Kamenar* filed a brief for the Washington Legal Foundation et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Bar Association by *Eugene C. Thomas, William A. Bradford, Jr.,* and *David W. Burgett;* for the Committee on Immigration and Nationality Law of the New York City Bar Association et al. by *Robert M. Kaufman, Carl R. Baldwin,* and *Steven M. Freeman;* for the International Human Rights Law Group by *Eli Whitney Debevoise II* and *Kimberly Till;*

PER CURIAM.

The judgment below is affirmed by an equally divided Court.

JUSTICE BLACKMUN took no part in the decision of this case. JUSTICE SCALIA took no part in the consideration or decision of this case.

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and for the Lawyers Committee for Human Rights et al. by *Arthur C. Helton.*

Ann H. Franke and *Jacqueline W. Mintz* filed a brief for the American Association of University Professors et al. as *amici curiae.*

Syllabus

COMMISSIONER OF INTERNAL REVENUE *v.* McCOY, EXECUTOR OF THE ESTATE OF McCOY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 87–75. Decided October 19, 1987

After the United States Tax Court sustained the Commissioner of Internal Revenue's determination that there was a deficiency in respondent's federal estate tax, respondent appealed to the Court of Appeals but did not file the appeal bond required by the Internal Revenue Code to stay the assessment and collection of the deficiency. The Commissioner therefore assessed the deficiency and issued a notice and demand for payment. When the deficiency was not paid within 10 days, an addition to tax accrued under § 6651(a)(3) of the Code. The Court of Appeals ultimately affirmed the Tax Court's decision that there was a deficiency. Shortly thereafter, respondent paid the tax but filed a petition with the Court of Appeals asking that the court "forgive" interest on the assessment and also the late-payment penalty. The court granted the requested relief "in order to achieve a fair and just result."

Held: The Court of Appeals exceeded its jurisdictional authority when it granted the petition to forgive interest and the late-payment penalty. Section 7482(a) of the Code gives the courts of appeals jurisdiction to review Tax Court decisions "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury," while § 7482(c)(1) provides that "such courts shall have the power to affirm or . . . modify or . . . reverse" the Tax Court's decision. Thus, the Court of Appeals' only jurisdiction here was to review the Tax Court's decision that there was a deficiency and to affirm that decision upon determining that it was correct. It was not empowered to decide other questions relating to interest and a penalty—questions that were not presented to the Tax Court and that could not have been so presented under §§ 6601(a) and 6651(a)(3) of the Code, which respectively make interest on a deficiency and accrued penalties separate and outside the scope of the petition to the Tax Court, and § 6213(a), which indicates that the deficiency asserted here could be assessed only after the Tax Court had rendered its decision—or to grant relief that the Tax Court itself, as a court of limited jurisdiction lacking general equitable powers, could not provide.

Certiorari granted; reversed.

PER CURIAM.

In this case, we are asked to determine whether the United States Court of Appeals exceeded its jurisdictional authority when, after affirming a decision of the United States Tax Court, it granted the taxpayer-estate's request to forgive interest on the determined deficiency in estate tax and also to forgive a statutorily imposed late-payment penalty. We are constrained to hold that the Court of Appeals did exceed its authority.

I

Arthur H. McCoy died testate on April 23, 1980. His son, Robert McCoy, the respondent here, was appointed executor of his will. At his death, the decedent was the owner of an undivided interest in a family farm in Clinton County, Ohio. The then fair market value of that interest was $235,140. Under § 2032A of the Internal Revenue Code of 1954, as amended, 26 U. S. C. § 2032A (1982 ed. and Supp. III), however, an estate may elect a special method for valuing certain real property for federal estate tax purposes. This alternative usually is elected if it produces a lower valuation and a lower tax. At the time relevant for the McCoy estate, the election was available only if the land in question was "qualified real property," see § 2032A(b)(1), and only if the election was made "not later than the time prescribed by section 6075(a) for filing the [estate tax] return . . . (including extensions thereof) . . . ." 26 U. S. C. § 2032A(d)(1) (1976 ed.). Since § 6075(a) provided that the return was to be filed within nine months of the decedent's death, and since no extension of time was obtained, respondent was required to make any election under § 2032A not later than January 23, 1981.

Respondent, however, did not file the return for the decedent's estate until February 11. In the return, the election as to the interest in the farm—which, it is conceded, would have been "qualified real property"—was asserted. The Commissioner of Internal Revenue, however, took the position that the election was untimely under §§ 2032A and

6075(a), and that the farm interest therefore was to be valued at the date-of-death figure of $235,140, rather than at the special-use figure of $103,304.70 claimed in the return as filed. The lower value would have produced no tax. The Commissioner, using the higher value, determined a deficiency in estate tax of $22,159.72.

Respondent sought redetermination of the asserted deficiency in the United States Tax Court. He contended that the time for making the election under § 2032A had been extended retroactively by amendments to the statute effected by the Economic Recovery Tax Act of 1981, Pub. L. 97–34, § 421(k)(5), 95 Stat. 314, note following 26 U. S. C. § 2032A.

The Tax Court rejected respondent's contention and sustained the deficiency. *Estate of McCoy*, 50 TCM 1194 (1985), ¶ 85,509 P–H Memo TC. The Court of Appeals affirmed. 809 F. 2d 333 (CA6 1987). After the Tax Court's decision, respondent did not file the appeal bond required by 26 U. S. C. § 7485, if assessment and collection of the deficiency were to be stayed. Despite the pendency of the appeal to the Sixth Circuit, the Commissioner therefore assessed the deficiency and issued a notice and demand for payment. When the deficiency was not paid within 10 days, an addition to tax accrued under 26 U. S. C. § 6651(a)(3). Shortly after the Court of Appeals issued its affirming opinion, respondent paid the tax but filed a petition with the Court of Appeals asking that that court "forgive" interest on the assessment and also the late-payment penalty. Respondent asserted that the case was one of first impression and that the estate would otherwise be the victim of an obscure after-the-fact statutory amendment. Respondent also claimed that he had litigated in good faith the validity of his § 2032A election.

The Court of Appeals on March 2, 1987, entered an order granting the relief requested by respondent's petition. App. to Pet. for Cert. 1a. It noted that "the interest and penalties now exceed the assessed tax," and it concluded that the inter-

est and penalties should be forgiven "in order to achieve a fair and just result." *Ibid.* The Commissioner seeks a writ of certiorari.

II

Under 26 U. S. C. § 7482(a), the regional federal courts of appeals have jurisdiction to review decisions of the Tax Court "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." Section 7482(c)(1) provides that "such courts shall have power to affirm or, if the decision of the Tax Court is not in accordance with law, to modify or to reverse the decision of the Tax Court." It follows that in reviewing a Tax Court decision, the duty of the court of appeals is to consider whether the Tax Court committed error. Plainly, the court of appeals lacks jurisdiction to decide an issue that was not the subject of the Tax Court proceeding or to grant relief that is beyond the powers of the Tax Court itself. *Taylor* v. *Commissioner*, 258 F. 2d 89, 91 (CA2 1958); *Vandenberge* v. *Commissioner*, 147 F. 2d 167, 168 (CA5), cert. denied, 325 U. S. 875 (1945). See *Commissioner* v. *Gooch Milling & Elevator Co.*, 320 U. S. 418 (1943). But cf. *Hormel* v. *Helvering*, 312 U. S. 552 (1941); *Singleton* v. *Wulff*, 428 U. S. 106, 120–121 (1976).

The Court of Appeals in this case clearly exceeded its jurisdictional bounds. Its only jurisdiction, under § 7482(a), was "to review the decisio[n] of the Tax Court." The latter court's decision was that "there is a deficiency in the amount of $22,159.72 in [respondent's] Federal estate tax." App. to Pet. for Cert. 28a. The Court of Appeals ruled that that decision was correct. Its duty, then, was to affirm the decision. It was not empowered to proceed further to decide other questions relating to interest and penalty—questions that were not presented, and could not possibly have been presented, to the Tax Court—or to grant relief that the Tax Court itself had no jurisdiction to provide.

Interest on a tax deficiency is separately mandated by 26 U. S. C. § 6601(a). A penalty that accrues under § 6651(a)(3) is also separate and outside the scope of the petition to the Tax Court. The deficiency asserted here was not assessed, and could not have been assessed, until after the Tax Court had rendered its decision. See § 6213(a). The Tax Court is a court of limited jurisdiction and lacks general equitable powers. *Commissioner* v. *Gooch Milling & Elevator Co.*, *supra*.

The estate, of course, was not without an opportunity to litigate the validity of the interest and the late-payment penalty. The proper procedure was for respondent to pay the interest and penalty and sue for their refund in an appropriate federal district court or in the Claims Court. The Sixth Circuit in the former case, and the Federal Circuit in the latter, then would have had jurisdiction to consider those issues on appeal.

We note in passing that the fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case. The Court of Appeals exceeded its jurisdiction regardless of nonpublication and regardless of any assumed lack of precedential effect of a ruling that is unpublished.

Certiorari is therefore granted and the order of March 2, 1987, is reversed.

It is so ordered.

JUSTICE MARSHALL, dissenting.

I continue to be troubled by this Court's willingness to dispose of appeals and petitions for certiorari through summary *per curiam* opinions, without the benefit of briefing on the merits or review of the full record of proceedings below. I have elaborated this view before, see *Montana* v. *Hall*, 481 U. S. 400, 405, n. 1 (1987) (MARSHALL, J., dissenting), as have other Justices of this Court, see *id.*, at 405, n. 2, but the admonition bears repeating.

My doubts about summary dispositions encompass concerns about both the parties who seek our review and the integrity, perceived and actual, of our proceedings. The Rules of this Court urge litigants filing petitions for certiorari to focus on the exceptional need for this Court's review rather than on the merits of the underlying case. Summary disposition thus flies in the face of legitimate expectations of the parties seeking redress in this Court and deprives them of any opportunity to argue the merits of their claims before judgment. Moreover, briefing on the merits should be encouraged not only because parties expect and deserve it, but because it leads to greater accuracy in our decisions. Briefing helps this Court to reduce as much as possible the inevitable incidence of error and confusion in our opinions each Term. Finally, the practice of summary disposition demonstrates insufficient respect for lower court judges and for our own dissenting colleagues on this Court.

I adhere to the view that whenever the Court contemplates a summary disposition, it should review the full record below and invite the parties to file supplemental briefs on the merits if they wish. I remain unconvinced that this slight modification of our practice would unduly burden the Court. The benefits of increasing the fairness and accuracy of our decisionmaking and the value of according greater respect to our colleagues on this and other courts more than justify these modest accommodations.

Syllabus

CHURCH OF SCIENTOLOGY OF CALIFORNIA *v.* INTERNAL REVENUE SERVICE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86–472. Argued October 5, 1987—Decided November 10, 1987

Section 6103(a) of the Internal Revenue Code provides that tax returns and "return information" shall be confidential and shall not be disclosed except as authorized. "Return information" is defined in § 6103(b)(2) to include a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, tax payments, or any other data with respect to a return or to the determination of the existence or amount of liability. However, § 6103(b)(2) also contains the proviso, known as the Haskell Amendment, that "return information" does not include data "in a form" which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. Upon the Internal Revenue Service's slow response to petitioner's Freedom of Information Act (FOIA) request for the production of numerous records containing information relating to it, petitioner filed suit in Federal District Court to compel release of the materials. The court held that the IRS had correctly limited its search for and disclosure of the requested materials, and the Court of Appeals affirmed, holding that the Haskell Amendment's "in a form" phrase contemplates agency reformulation of return information into a statistical study or some other composite product and not merely the deletion of the taxpayer's name and other identifying data.

Held: The Haskell Amendment does not exempt from § 6103(b)(2)'s definition of confidential "return information" material in IRS files which can be redacted to delete those parts which would identify a particular taxpayer. If the mere removal of identifying details sufficed to put the information "in a form" envisioned by the Amendment, the remainder of the protected categories of information included in § 6103(b)(2) would often be irrelevant, and the "in a form" phrase would itself be extremely awkward, confusing, and unnecessary. Petitioner's contrary construction of the Amendment is likewise belied by other provisions of § 6103 which set forth various exceptions to the general rule of confidentiality and recognize that "return information" remains such even when it does not identify a particular taxpayer. Moreover, the legislative history also refutes petitioner's construction, since allowing the disclosure of

otherwise confidential return information merely by the redaction of identifying details would undercut § 6103's primary purpose of limiting access to tax filings. In fact, the Amendment was simply intended to permit continuation of the IRS' practice of releasing statistical studies and compilations that do not identify particular taxpayers. Thus, since deletion of identifying data would not make otherwise protected return information discloseable, there is no merit to petitioner's contention that respondent has an FOIA duty to undertake such redaction. Pp. 14–18.

253 U. S. App. D. C. 85, 792 F. 2d 153, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which all other Members joined, except BRENNAN and SCALIA, JJ., who took no part in the consideration or decision of the case.

Michael Lee Hertzberg argued the cause for petitioner. With him on the briefs were *Eric M. Lieberman* and *Ellen J. Winner.*

Deputy Solicitor General Lauber argued the cause for respondent. With him on the brief were *Solicitor General Fried, Acting Assistant Attorney General Mann,* and *Alan I. Horowitz.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Section 6103 of the Internal Revenue Code, 26 U. S. C. § 6103, lays down a general rule that "returns" and "return information" as defined therein shall be confidential. "Return information" is elaborately defined in § 6103(b)(2); immediately after that definition appears the following proviso, known as the Haskell Amendment:

> "[B]ut such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer."

Petitioner Church of Scientology of California, seeking disclosure under the Freedom of Information Act, contends that

**David C. Vladeck* and *Alan B. Morrison* filed a brief for Professor John L. Neufeld et al. as *amici curiae* urging reversal.

John A. Powell, Stephen K. Strong, and *David F. Stobaugh* filed a brief for the American Civil Liberties Union et al. as *amici curiae.*

the Haskell Amendment excepts from the definition of "return information" all material in the files of the Internal Revenue Service (IRS) which can be redacted to delete those parts which would identify a particular taxpayer. Respondent IRS in opposition argues that the mere redaction of identifying data will not, by virtue of the Haskell Amendment, take the material out of the definition of "return information." We agree with the IRS.

Petitioner filed a request with respondent under the Freedom of Information Act (FOIA), 5 U. S. C. §552, for the production of numerous documents. Among the materials sought by petitioner were "[c]opies of all information relating to or containing the names of, Scientology, Church of Scientology, any specific Scientology church or entity identified by containing the words Scientology, Hubbard and/or Dianetics in their names, L. Ron Hubbard or Mary Sue Hubbard in the form of written record, correspondence, document, memorandum, form, computor *[sic]* tape, computor *[sic]* program or microfilm, which is contained in" an extensive list of respondent's case files and data systems. FOIA Request Dated May 16, 1980, App. 20a–27a. Petitioner also requested similar information from the offices and personal areas of a number of respondent's officials.

Dissatisfied by the slow response to its request, petitioner filed suit in the United States District Court for the District of Columbia to compel release of the materials. In the District Court the parties agreed—as they continue to agree here—that §6103 of the Internal Revenue Code is the sort of statute referred to by the FOIA in 5 U. S. C. §552(b)(3) relating to matters that are "specifically exempted from disclosure by statute . . . "; thus, if §6103 forbids the disclosure of material, it may not be produced in response to a request under the FOIA. Respondent argued that many of the records were protected as "returns" or "return information" under §6103. Section 6103(a) provides that "[r]eturns and return information shall be confidential" and shall not be

disclosed "except as authorized by this title." A "return" is defined in § 6103(b)(1) as "any tax or information return, declaration of estimated tax, or claim for refund" including supporting schedules, attachments, and lists. Section 6103(b)(2) then supplies a more extensive definition of "return information," which includes:

> "[A] taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, over-assessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense . . . ."

After providing this detailed explanation of confidential "return information," § 6103(b)(2), as previously noted, continues: "but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." This last clause—the Haskell Amendment—was proposed as a floor amendment by Senator Haskell of Colorado and was adopted by a voice vote during the debate on the 1976 amendments to the Internal Revenue Code.

The District Court, after an *in camera* review of representative documents, held that respondent had correctly limited its search for and disclosure of materials requested by petitioner. 569 F. Supp. 1165 (DC 1983). Petitioner appealed that decision to the United States Court of Appeals for the District of Columbia Circuit. Following briefing and argument before a three-judge panel, the Court of Ap-

peals *sua sponte* undertook en banc review of the meaning of the Haskell Amendment and the modification it works upon § 6103(b)(2). The Court of Appeals concluded that, by using the words "in a form," Congress contemplated "not merely the deletion of an identifying name or symbol on a document that contains return information, but agency *reformulation* of the return information into a statistical study or some other composite product . . . ." 253 U. S. App. D. C. 85, 92, 792 F. 2d 153, 160 (1986) (emphasis in original). Thus, the court held, before respondent may produce documents otherwise protected, the Haskell Amendment requires that some modification have occurred in the form of the data contained in the documents. "[M]ere deletion of the taxpayer's name or other identifying data is not enough, since that would render the reformulation requirement entirely duplicative of the nonidentification requirement."[1] *Id.*, at 95, 792 F. 2d, at 163.

We granted certiorari, 479 U. S. 1063 (1987), to consider the scope of the Haskell Amendment and its relation to the

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[1] The decision of the District of Columbia Circuit was thus in substantial agreement with the Seventh Circuit's opinion in *King* v. *IRS*, 688 F. 2d 488 (1982), and the Eleventh Circuit's determination in *Currie* v. *IRS*, 704 F. 2d 523 (1983). The Seventh Circuit concluded in *King* that § 6103 "protects from disclosure all nonamalgamated items listed in subsection (b)(2)(A), and that the Haskell Amendment provides only for the disclosure of statistical tabulations which are not associated with or do not identify particular taxpayers." 688 F. 2d, at 493. Similarly, in *Currie* the Eleventh Circuit held that the Haskell Amendment does not obligate the IRS, in a suit under the FOIA, to delete identifying material from documents and release what would otherwise be return information. 704 F. 2d, at 531–532.

The Ninth Circuit, however, reached a different result in *Long* v. *IRS*, 596 F. 2d 362 (1979), cert. denied, 446 U. S. 917 (1980). In *Long*, the court found that the Haskell Amendment removes from the category of protected return information any documents that do not identify a particular taxpayer once names, addresses, and similar details are deleted. See 596 F. 2d, at 367–369.

confidentiality provisions of §§ 6103(a) and (b).[2] Petitioner believes that the Haskell Amendment makes significantly greater inroads on the definition of "return information" than did the Court of Appeals. It makes two interrelated contentions: first, that the Haskell Amendment removes from the classification of "return information" all data which do not identify a particular taxpayer, and, second, that 5 U. S. C. § 552(b)—requiring that "[a]ny reasonably segregable portion" of a record be provided to a requester after deletion of the portions which are exempt—compels respondent to redact "return information" in its files where possible so as to bring that material within the terms of the Haskell Amendment. We reject both of these arguments.

We are told by the IRS that, as a practical matter, "return information" might include the report of an audit examination, internal IRS correspondence concerning a taxpayer's claim, or a notice of deficiency issued by the IRS proposing an increase in the taxpayer's assessment. Tr. of Oral Arg. 24–25. Petitioner asserts that the segregation requirement of the FOIA, § 552(b), directs respondent to remove the identifiers from such documents as these and that, once the materials are purged of such identifiers, they must be disclosed because they no longer constitute return information described in § 6103(b)(2).

We find no support for petitioner's arguments in either the language of § 6103 or in its legislative history. In addition to

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[2] The original panel applied the en banc decision to the search and disclosure undertaken by respondent. See 253 U. S. App. D. C. 78, 792 F. 2d 146 (1986). Although many of the requested documents were protected as "return information," the panel found that the District Court had erred in accepting respondent's blanket assertion that all information responsive to petitioner's request in files unrelated to petitioner's California branch was exempt from disclosure. The panel remanded the case to District Court with instructions that respondent conduct a new search for information about the third parties identified by petitioner and justify any withholding of the information under the FOIA or § 6103. See *id.*, at 84–85, 792 F. 2d, at 152–153.

the returns themselves, which are protected from disclosure by § 6103(b)(1), § 6103(b)(2) contains an elaborate description of the sorts of information related to returns that respondent is compelled to keep confidential. If the mere removal of identifying details from return information sufficed to put the information "in a form" envisioned by the Haskell Amendment, the remainder of the categories included in § 6103(b)(2) would often be irrelevant. The entire section could have been prefaced by the simple instruction to respondent that the elimination of identifiers would shift related tax data outside the realm of protected return information. Respondent would then first determine whether the information could be redacted so as not to identify a taxpayer; only if it could not would the extensive list of materials that constitute "return information" become pertinent. And if petitioner correctly interprets the intent of the Haskell Amendment, Congress' drafting was awkward in the extreme. The Amendment exempts "data *in a form*" (emphasis added) that cannot be associated with or otherwise identify a particular taxpayer. A much more natural phrasing would omit the confusing and unnecessary words "in a form" and refer simply to data.

Other provisions of § 6103 likewise belie petitioner's construction of the Haskell Amendment. Subsections (c) through (o) of § 6103 set forth various exceptions to the general rule that returns and return information are confidential and not to be disclosed. These subsections provide that in some circumstances, and with special safeguards, returns and return information can be made available to congressional committees, the President, state tax officials, and other federal agencies. The subsections also recognize that "return information" remains such even when it does not identify a particular taxpayer. Subsections 6103 (f)(1), (2), and (4), for example, allow the release of returns and return information to congressional committees, but distinguish between return information that identifies a taxpayer and return information that does not. Subsection (f) is thus inconsistent with peti-

tioner's theory that nonidentifying data cease to be return information at all.

The legislative history of the Tax Reform Act of 1976, Pub. L. 94–455, 90 Stat. 1520, of which the amendments to § 6103 are a part, also indicates that Congress did not intend the statute to allow the disclosure of otherwise confidential return information merely by the redaction of identifying details. One of the major purposes in revising § 6103 was to tighten the restrictions on the use of return information by entities other than respondent. See S. Rep. No. 94–938, p. 318 (1976) ("[R]eturns and return information should generally be treated as confidential and not subject to disclosure except in those limited situations delineated in the newly amended section 6103"). Petitioner's suggestion that the Haskell Amendment was intended to modify the restrictions of § 6103 by making all nonidentifying return information eligible for disclosure would mean that the Amendment was designed to undercut the legislation's primary purpose of limiting access to tax filings.

The circumstances under which the Haskell Amendment was adopted make us reluctant to credit it with this expansive purpose. During debate on the Senate floor, Senator Haskell proposed that § 6103(b)(2) be amended to make clear that return information "does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." He then added this explanation of his proposal:

> "[T]he purpose of this amendment is to insure that statistical studies and other compilations of data now prepared by the Internal Revenue Service and disclosed by it to outside parties will continue to be subject to disclosure to the extent allowed under present law. Thus the Internal Revenue Service can continue to release for research purposes statistical studies and compilations of data, such as the tax model, which do not identify individual taxpayers.

> "The definition of 'return information' was intended to neither enhance nor diminish access now obtainable under the Freedom of Information Act to statistical studies and compilations of data by the Internal Revenue Service. Thus, the addition by the Internal Revenue Service of easily deletable identifying information to the type of statistical study or compilation of data which, under its current practice, has *[sic]* been subject to disclosure, will not prevent disclosure of such study or compilation under the newly amended § 6103. In such an instance, the identifying information would be deleted and disclosure of the statistical study or compilation of data be made." 122 Cong. Rec. 24012 (1976).

After these remarks, the floor manager of the legislation, Senator Long, added that he would "be happy to take this amendment to conference. It might not be entirely necessary, but it might serve a good purpose." The Haskell Amendment was then passed by voice vote in the Senate and became part of the conference bill.

We find it difficult to believe that Congress in this manner adopted an amendment which would work such an alteration to the basic thrust of the draft bill amending § 6103. The Senate's purpose in revising § 6103 was, as we have noted, to impose greater restrictions on the disclosure of tax data; a change in the proposed draft permitting disclosure of all return information after deletion of material identifying a particular taxpayer would have, it seems to us, at a minimum engendered some debate in the Senate and resulted in a rollcall vote. More importantly, Senator Haskell's remarks clearly indicate that he did not mean to revise § 6103(b)(2) in this fashion. He refers only to statistical studies and compilations, and gives no intimation that his amendment would require respondent to remove identifying details from material as it exists in its files in order to comply with its requirement. All in all, we think this is a case where common sense suggests, by analogy to Sir Arthur Conan Doyle's "dog that

didn't bark," that an amendment having the effect petitioner ascribes to it would have been differently described by its sponsor, and not nearly as readily accepted by the floor manager of the bill.

We thus hold that, as with a return itself, removal of identification from return information would not deprive it of protection under § 6103(b). Since such deletion would not make otherwise protected return information discloseable, respondent has no duty under the FOIA to undertake such redaction. The judgment of the Court of Appeals is accordingly

Affirmed.

JUSTICES BRENNAN and SCALIA took no part in the consideration or decision of this case.

CARPENTER ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 86–422. Argued October 7, 1987—Decided November 16, 1987

Petitioner Winans was coauthor of a Wall Street Journal investment advice column which, because of its perceived quality and integrity, had an impact on the market prices of the stocks it discussed. Although he was familiar with the Journal's rule that the column's contents were the Journal's confidential information prior to publication, Winans entered into a scheme with petitioner Felis and another stockbroker who, in exchange for advance information from Winans as to the timing and contents of the column, bought and sold stocks based on the column's probable impact on the market and shared their profits with Winans. On the basis of this scheme, Winans and Felis were convicted of violations of the federal securities laws and of the federal mail and wire fraud statutes, 18 U. S. C. §§ 1341, 1343, which prohibit the use of the mails or of electronic transmissions to execute "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises"; petitioner Carpenter was convicted of aiding and abetting. The Court of Appeals affirmed.

Held:

1. Insofar as it affirmed petitioners' convictions under the securities laws, the judgment below is affirmed by an equally divided Court. P. 24.

2. Petitioners' conspiracy to trade on the Journal's confidential information is within the reach of the mail and wire fraud statutes. Pp. 25–28.

(a) The Journal had a "property" right in keeping confidential and making exclusive use, prior to publication, of the schedule and contents of Winans' columns, which right is protected by the statutes. The intangible nature of the Journal's right cannot affect this determination, since *McNally* v. *United States*, 483 U. S. 350, did not limit the scope of § 1341 to the protection of tangible as opposed to intangible property rights, but merely distinguished protected property rights from unprotected intangible rights to honest and impartial government. Pp. 25–27.

(b) Petitioners' activities constituted a scheme to defraud the Journal within the meaning of the statutes. It is irrelevant that petitioners might not have interfered with the Journal's use of its confidential information, publicized the information, deprived the Journal of the first public use of the information, or caused the Journal monetary loss, it

being sufficient that the Journal has been deprived of its important right to exclusive use of the information prior to disclosing it to the public. The argument that Winans' conduct merely violated workplace rules and did not amount to proscribed fraudulent activity is untenable, since §§ 1341 and 1343 reach any scheme to deprive another of property by means of fraud, including the fraudulent appropriation to one's own use of property entrusted to one's care by another. Here, Winans violated his fiduciary obligation to protect his employer's confidential information by exploiting that information for his personal benefit, all the while pretending to perform his duty of safeguarding it. Furthermore, the evidence strongly supports the conclusion that each of the petitioners acted with the required specific intent to defraud. Pp. 27–28.

(c) Petitioners' contention that the use of the wires and the mail to print and send the Journal to its customers is insufficient to satisfy the statutory requirement that the mails be used to execute the scheme at issue is rejected. Circulation of the column to Journal customers was not only anticipated but was an essential part of the scheme, since there would have been no effect on stock prices and no likelihood of profiting from the leaked information without such circulation. P. 28.

791 F. 2d 1024, affirmed.

WHITE, J., delivered the opinion for a unanimous Court as to holding number 2, above.

Don D. Buchwald argued the cause for petitioners. With him on the briefs were *Jed S. Rakoff*, *Howard W. Goldstein*, *James Niss*, *E. Michael Bradley*, *I. Scott Bieler*, and *Alan R. Kaufman*.

Solicitor General Fried argued the cause for the United States. With him on the brief were *Assistant Attorney General Weld*, *Deputy Solicitor General Cohen*, *Charles A. Rothfeld*, *Daniel L. Goelzer*, *Paul Gonson*, *Jacob H. Stillman*, *Rosalind C. Cohen*, and *Katherine Gresham*.*

JUSTICE WHITE delivered the opinion of the Court.

Petitioners Kenneth Felis and R. Foster Winans were convicted of violating § 10(b) of the Securities Exchange Act of

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**Benjamin W. Heineman, Jr.*, and *Carter G. Phillips* filed a brief for the Reporters Committee for Freedom of the Press et al. as *amici curiae* urging reversal.

1934, 48 Stat. 891, 15 U. S. C. § 78j(b),[1] and Rule 10b–5, 17 CFR § 240.10b–5 (1987).[2] *United States* v. *Winans*, 612 F. Supp. 827 (SDNY 1985). They were also found guilty of violating the federal mail and wire fraud statutes, 18 U. S. C. §§ 1341,[3] 1343,[4] and were convicted for conspiracy under 18

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[1] Section 10(b) provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

. . . . .

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

[2] Rule 10b–5 provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any national securities exchange,

"(a) To employ any device, scheme, or artifice to defraud,

"(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

"in connection with the purchase or sale of any security."

[3] Section 1341 provides:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

[Footnote 4 is on p. 22]

U. S. C. § 371.[5] Petitioner David Carpenter, Winans' roommate, was convicted for aiding and abetting. With a minor exception, the Court of Appeals for the Second Circuit affirmed, 791 F. 2d 1024 (1986); we granted certiorari, 479 U. S. 1016 (1986).

I

In 1981, Winans became a reporter for the Wall Street Journal (the Journal) and in the summer of 1982 became one of the two writers of a daily column, "Heard on the Street." That column discussed selected stocks or groups of stocks, giving positive and negative information about those stocks and taking "a point of view with respect to investment in the stocks that it reviews." 612 F. Supp., at 830. Winans regularly interviewed corporate executives to put together interesting perspectives on the stocks that would be highlighted in upcoming columns, but, at least for the columns at issue here, none contained corporate inside information or any "hold for release" information. *Id.*, at 830, n. 2. Because of the "Heard" column's perceived quality and integrity, it had the potential of affecting the price of the stocks which it examined. The District Court concluded on the basis of testimony presented at trial that the "Heard" column "does have an im-

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[4] Section 1343 provides:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

[5] Section 371 provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

pact on the market, difficult though it may be to quantify in any particular case." *Id.*, at 830.

The official policy and practice at the Journal was that prior to publication, the contents of the column were the Journal's confidential information. Despite the rule, with which Winans was familiar, he entered into a scheme in October 1983 with Peter Brant and petitioner Felis, both connected with the Kidder Peabody brokerage firm in New York City, to give them advance information as to the timing and contents of the "Heard" column. This permitted Brant and Felis and another conspirator, David Clark, a client of Brant, to buy or sell based on the probable impact of the column on the market. Profits were to be shared. The conspirators agreed that the scheme would not affect the journalistic purity of the "Heard" column, and the District Court did not find that the contents of any of the articles were altered to further the profit potential of petitioners' stock-trading scheme. *Id.*, at 832, 834–835. Over a 4-month period, the brokers made prepublication trades on the basis of information given them by Winans about the contents of some 27 "Heard" columns. The net profits from these trades were about $690,000.

In November 1983, correlations between the "Heard" articles and trading in the Clark and Felis accounts were noted at Kidder Peabody and inquiries began. Brant and Felis denied knowing anyone at the Journal and took steps to conceal the trades. Later, the Securities and Exchange Commission began an investigation. Questions were met by denials both by the brokers at Kidder Peabody and by Winans at the Journal. As the investigation progressed, the conspirators quarreled, and on March 29, 1984, Winans and Carpenter went to the SEC and revealed the entire scheme. This indictment and a bench trial followed. Brant, who had pleaded guilty under a plea agreement, was a witness for the Government.

The District Court found, and the Court of Appeals agreed, that Winans had knowingly breached a duty of con-

fidentiality by misappropriating prepublication information regarding the timing and contents of the "Heard" column, information that had been gained in the course of his employment under the understanding that it would not be revealed in advance of publication and that if it were, he would report it to his employer. It was this appropriation of confidential information that underlay both the securities laws and mail and wire fraud counts. With respect to the § 10(b) charges, the courts below held that the deliberate breach of Winans' duty of confidentiality and concealment of the scheme was a fraud and deceit on the Journal. Although the victim of the fraud, the Journal, was not a buyer or seller of the stocks traded in or otherwise a market participant, the fraud was nevertheless considered to be "in connection with" a purchase or sale of securities within the meaning of the statute and the rule. The courts reasoned that the scheme's sole purpose was to buy and sell securities at a profit based on advance information of the column's contents. The courts below rejected petitioners' submission, which is one of the two questions presented here, that criminal liability could not be imposed on petitioners under Rule 10b–5 because "the newspaper is the only alleged victim of fraud and has no interest in the securities traded."

In affirming the mail and wire fraud convictions, the Court of Appeals ruled that Winans had fraudulently misappropriated "property" within the meaning of the mail and wire fraud statutes and that its revelation had harmed the Journal. It was held as well that the use of the mail and wire services had a sufficient nexus with the scheme to satisfy §§ 1341 and 1343. The petition for certiorari challenged these conclusions.

The Court is evenly divided with respect to the convictions under the securities laws and for that reason affirms the judgment below on those counts. For the reasons that follow, we also affirm the judgment with respect to the mail and wire fraud convictions.

II

Petitioners assert that their activities were not a scheme to defraud the Journal within the meaning of the mail and wire fraud statutes;[6] and that in any event, they did not obtain any "money or property" from the Journal, which is a necessary element of the crime under our decision last Term in *McNally* v. *United States*, 483 U. S. 350 (1987). We are unpersuaded by either submission and address the latter first.

We held in *McNally* that the mail fraud statute does not reach "schemes to defraud citizens of their intangible rights to honest and impartial government," *id.*, at 355, and that the statute is "limited in scope to the protection of property rights." *Id.*, at 360. Petitioners argue that the Journal's interest in prepublication confidentiality for the "Heard" columns is no more than an intangible consideration outside the reach of § 1341; nor does that law, it is urged, protect against mere injury to reputation. This is not a case like *McNally*, however. The Journal, as Winans' employer, was defrauded of much more than its contractual right to his honest and faithful service, an interest too ethereal in itself to fall within the protection of the mail fraud statute, which "had its origin in the desire to protect individual property rights." *McNally*, *supra*, at 359, n. 8. Here, the object of the scheme was to take the Journal's confidential business information—the publication schedule and contents of the "Heard" column—and its intangible nature does not make it any less "property" protected by the mail and wire fraud statutes. *McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights.

Both courts below expressly referred to the Journal's interest in the confidentiality of the contents and timing of the "Heard" column as a property right, 791 F. 2d, at 1034–1035; 612 F. Supp., at 846, and we agree with that conclusion.

[6] The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses here.

Confidential business information has long been recognized as property. See *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1001–1004 (1984); *Dirks* v. *SEC*, 463 U. S. 646, 653, n. 10 (1983); *Board of Trade of Chicago* v. *Christie Grain & Stock Co.*, 198 U. S. 236, 250–251 (1905); cf. 5 U. S. C. § 552(b)(4). "Confidential information acquired or compiled by a corporation in the course and conduct of its business is a species of property to which the corporation has the exclusive right and benefit, and which a court of equity will protect through the injunctive process or other appropriate remedy." 3 W. Fletcher, Cyclopedia of Law of Private Corporations § 857.1, p. 260 (rev. ed. 1986) (footnote omitted). The Journal had a property right in keeping confidential and making exclusive use, prior to publication, of the schedule and contents of the "Heard" column. *Christie Grain*, *supra*. As the Court has observed before:

> "[N]ews matter, however little susceptible of ownership or dominion in the absolute sense, is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise." *International News Service* v. *Associated Press*, 248 U. S. 215, 236 (1918).

Petitioners' arguments that they did not interfere with the Journal's use of the information or did not publicize it and deprive the Journal of the first public use of it, see Reply Brief for Petitioners 6, miss the point. The confidential information was generated from the business, and the business had a right to decide how to use it prior to disclosing it to the public. Petitioners cannot successfully contend based on *Associated Press* that a scheme to defraud requires a monetary loss, such as giving the information to a competitor; it is sufficient that the Journal has been deprived of its right to exclusive use of the information, for exclusivity is an important as-

pect of confidential business information and most private property for that matter.

We cannot accept petitioners' further argument that Winans' conduct in revealing prepublication information was no more than a violation of workplace rules and did not amount to fraudulent activity that is proscribed by the mail fraud statute. Sections 1341 and 1343 reach any scheme to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises. As we observed last Term in *McNally*, the words "to defraud" in the mail fraud statute have the "common understanding" of "'wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.'" 483 U. S., at 358 (quoting *Hammerschmidt* v. *United States*, 265 U. S. 182, 188 (1924)). The concept of "fraud" includes the act of embezzlement, which is "'the fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another.'" *Grin* v. *Shine*, 187 U. S. 181, 189 (1902).

The District Court found that Winans' undertaking at the Journal was not to reveal prepublication information about his column, a promise that became a sham when in violation of his duty he passed along to his co-conspirators confidential information belonging to the Journal, pursuant to an ongoing scheme to share profits from trading in anticipation of the "Heard" column's impact on the stock market. In *Snepp* v. *United States*, 444 U. S. 507, 515, n. 11 (1980) *(per curiam)*, although a decision grounded in the provisions of a written trust agreement prohibiting the unapproved use of confidential Government information, we noted the similar prohibitions of the common law, that "even in the absence of a written contract, an employee has a fiduciary obligation to protect confidential information obtained during the course of his employment." As the New York courts have recognized: "It is well established, as a general proposition, that a person who acquires special knowledge or information by virtue of a confidential or fiduciary relationship with another is not free

to exploit that knowledge or information for his own personal benefit but must account to his principal for any profits derived therefrom." *Diamond* v. *Oreamuno*, 24 N. Y. 2d 494, 497, 248 N. E. 2d 910, 912 (1969); see also Restatement (Second) of Agency §§ 388, Comment *c*, 396(c) (1958).

We have little trouble in holding that the conspiracy here to trade on the Journal's confidential information is not outside the reach of the mail and wire fraud statutes, provided the other elements of the offenses are satisfied. The Journal's business information that it intended to be kept confidential was its property; the declaration to that effect in the employee manual merely removed any doubts on that score and made the finding of specific intent to defraud that much easier. Winans continued in the employ of the Journal, appropriating its confidential business information for his own use, all the while pretending to perform his duty of safeguarding it. In fact, he told his editors twice about leaks of confidential information not related to the stock-trading scheme, 612 F. Supp., at 831, demonstrating both his knowledge that the Journal viewed information concerning the "Heard" column as confidential and his deceit as he played the role of a loyal employee. Furthermore, the District Court's conclusion that each of the petitioners acted with the required specific intent to defraud is strongly supported by the evidence. *Id.*, at 847–850.

Lastly, we reject the submission that using the wires and the mail to print and send the Journal to its customers did not satisfy the requirement that those mediums be used to execute the scheme at issue. The courts below were quite right in observing that circulation of the "Heard" column was not only anticipated but an essential part of the scheme. Had the column not been made available to Journal customers, there would have been no effect on stock prices and no likelihood of profiting from the information leaked by Winans.

The judgment below is

Affirmed.

Syllabus

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL–CIO, ET AL. *v.* MISCO, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 86–651. Argued October 13, 1987—Decided December 1, 1987

Respondent employer's collective-bargaining agreement with petitioner union authorizes the submission to binding arbitration of any grievance that arises from the interpretation or application of the agreement's terms, and reserves to management the right to establish, amend, and enforce rules regulating employee discharge and discipline and setting forth disciplinary procedures. One of respondent's rules listed as causes for discharge the possession or use of controlled substances on company property. Isiah Cooper, an employee covered by the agreement who operated a hazardous machine, was apprehended by police in the backseat of someone else's car in respondent's parking lot with marijuana smoke in the air and a lighted marijuana cigarette in the frontseat ashtray. A police search of Cooper's own car on the lot revealed marijuana gleanings. Upon learning of the cigarette incident, respondent discharged Cooper for violation of the disciplinary rule. Cooper then filed a grievance which proceeded to arbitration on the stipulated issue whether respondent had just cause for the discharge under the rule and, if not, the appropriate remedy. The arbitrator upheld the grievance and ordered Cooper's reinstatement, finding that the cigarette incident was insufficient proof that Cooper was using or possessed marijuana on company property. Because, at the time of the discharge, respondent was not aware of, and thus did not rely upon, the fact that marijuana had been found in Cooper's own car, the arbitrator refused to accept this fact into evidence. However, the District Court vacated the arbitration award and the Court of Appeals affirmed, ruling that reinstatement would violate the public policy "against the operation of dangerous machinery by persons under the influence of drugs." The court held that the cigarette incident and the finding of marijuana in Cooper's car established a violation of the disciplinary rule that gave respondent just cause for discharge.

Held:

1. The Court of Appeals exceeded the limited authority possessed by a court reviewing an arbitrator's award entered pursuant to a collective-bargaining agreement. Pp. 36–42.

(a) Absent fraud by the parties or the arbitrator's dishonesty, reviewing courts in such cases are not authorized to reconsider the merits of the award, since this would undermine the federal policy of privately settling labor disputes by arbitration without governmental intervention. The parties having agreed to submit all questions of contract interpretation to the arbitrator, the reviewing court is confined to ascertaining whether the award draws its essence from the contract and does not simply reflect the arbitrator's own notions of industrial justice. As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the court cannot overturn his decision simply because it disagrees with his factual findings, contract interpretations, or choice of remedies. Pp. 36–38.

(b) The Court of Appeals was not free to refuse enforcement of the award simply because it considered the cigarette incident ample proof that the disciplinary rule had been violated, since no dishonesty is alleged here, and since improvident factfinding is hardly a sufficient basis for disregarding what the arbitrator appointed by the parties determined to be the historical facts. Nor is the arbitrator's refusal to consider the evidence of marijuana in Cooper's car a sufficient basis for nonenforcement, since the collective-bargaining agreement largely left evidentiary matters to the arbitrator, whose decision on this point was consistent with the practice followed by other arbitrators of refusing to admit evidence which a discharging party did not rely upon. Assuming that the arbitrator did err on this point, his error was not in bad faith or so gross as to amount to affirmative misconduct. Moreover, his decision not to consider the disputed evidence did not forever foreclose respondent's use of that evidence as a basis for discharge. Even if it were open to the court to find a disciplinary rule violation on the basis of that evidence, the court could not properly set aside the award because in its view discharge was the correct remedy, since arbitrators normally have wide discretion in formulating remedies. Although the agreement here may have limited the arbitrator's remedial discretion by giving respondent the unreviewable right to discharge violators of the disciplinary rule, the proper course would have been remand to the arbitrator for a definitive construction of the contract in this respect. Pp. 39–42.

2. The Court of Appeals erred in setting aside the arbitral award on public policy grounds. A court's refusal to enforce an arbitrator's *interpretation* of a collective-bargaining agreement is limited to situations where the contract as interpreted would violate "some explicit public policy" that is "well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *W. R. Grace & Co.* v. *Rubber Workers*, 461 U. S. 757, 766. An alleged public policy must be properly

framed under the approach set out in *W. R. Grace*, and the violation of such policy must be clearly shown. Here, the court made no attempt to review existing laws and legal precedents, but simply formulated a policy against the operation of dangerous machinery under the influence of drugs based on "general considerations of supposed public interests." Even if that formulation could be accepted, no violation of the policy was clearly shown, since the assumed connection between the marijuana gleanings in Cooper's car and his actual use of drugs in the workplace is tenuous at best. It was inappropriate for the court itself to draw that inference, since such factfinding is the task of the arbitrator chosen by the parties, not the reviewing court. Furthermore, the award ordered Cooper's reinstatement in his old job or an equivalent one for which he was qualified, and it is not clear that he would pose a threat to the asserted public policy in every such alternative job. Pp. 42–45.

768 F. 2d 739, reversed.

WHITE, J., delivered the opinion for a unanimous Court. BLACKMUN, J., filed a concurring opinion, in which BRENNAN, J., joined, *post*, p. 46.

David Silberman argued the cause for petitioners. With him on the briefs were *Lynn Agee*, *Michael Gottesman*, and *Laurence Gold*.

A. Richard Gear argued the cause and filed a brief for respondent.*

JUSTICE WHITE delivered the opinion of the Court.

The issue for decision involves several aspects of when a federal court may refuse to enforce an arbitration award rendered under a collective-bargaining agreement.

I

Misco, Inc. (Misco, or the Company), operates a paper converting plant in Monroe, Louisiana. The Company is a party to a collective-bargaining agreement with the United Paperworkers International Union, AFL–CIO, and its union local (the Union); the agreement covers the production and main-

**David E. Feller* and *William P. Murphy* filed a brief for the National Academy of Arbitrators as *amicus curiae* urging reversal.

Philip A. Lacovara and *William R. Stein* filed a brief for Northwest Airlines, Inc., et al. as *amici curiae* urging affirmance.

tenance employees at the plant. Under the agreement, the Company or the Union may submit to arbitration any grievance that arises from the interpretation or application of its terms, and the arbitrator's decision is final and binding upon the parties. The arbitrator's authority is limited to interpretation and application of the terms contained in the agreement itself. The agreement reserves to management the right to establish, amend, and enforce "rules and regulations regulating the discipline or discharge of employees" and the procedures for imposing discipline. Such rules were to be posted and were to be in effect "until ruled on by grievance and arbitration procedures as to fairness and necessity."[1] For about a decade, the Company's rules had listed as causes for discharge the bringing of intoxicants, narcotics, or controlled substances on to plant property or consuming any of them there, as well as reporting for work under the influence of such substances.[2] At the time of the events involved in this case, the Company was very concerned about the use of drugs at the plant, especially among employees on the night shift.

Isiah Cooper, who worked on the night shift for Misco, was one of the employees covered by the collective-bargaining agreement. He operated a slitter-rewinder machine, which uses sharp blades to cut rolling coils of paper. The arbitrator found that this machine is hazardous and had caused numerous injuries in recent years. Cooper had been reprimanded twice in a few months for deficient performance.

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[1] App. 20–21. The language quoted is from Article XI of the agreement, which concerns maintenance of discipline. Article VI of the agreement sets out the arbitration procedure. *Id.*, at 18–20. The reserved rights of management are specified in Article IV of the agreement. *Id.*, at 13–15.

[2] Rule II.1 lists the following as causes for discharge: "Bringing intoxicants, narcotics, or controlled substances into, or consuming intoxicants, narcotics or controlled substances in the plant, or on plant premises. Reporting for duty under the influence of intoxicants, narcotics, or controlled substances." App. to Pet. for Cert. 31a.

On January 21, 1983, one day after the second reprimand, the police searched Cooper's house pursuant to a warrant, and a substantial amount of marijuana was found. Contemporaneously, a police officer was detailed to keep Cooper's car under observation at the Company's parking lot. At about 6:30 p.m., Cooper was seen walking in the parking lot during work hours with two other men. The three men entered Cooper's car momentarily, then walked to another car, a white Cutlass, and entered it. After the other two men later returned to the plant, Cooper was apprehended by police in the backseat of this car with marijuana smoke in the air and a lighted marijuana cigarette in the frontseat ashtray. The police also searched Cooper's car and found a plastic scales case and marijuana gleanings. Cooper was arrested and charged with marijuana possession.[3]

On January 24, Cooper told the Company that he had been arrested for possession of marijuana at his home; the Company did not learn of the marijuana cigarette in the white Cutlass until January 27. It then investigated and on February 7 discharged Cooper, asserting that in the circumstances, his presence in the Cutlass violated the rule against having drugs on the plant premises.[4] Cooper filed a grievance protesting his discharge the same day, and the matter proceeded to arbitration. The Company was not aware until September 21, five days before the arbitration hearing was scheduled, that marijuana had been found in Cooper's car. That fact did not become known to the Union until the hearing began. At the hearing it was stipulated that the issue was whether the Company had "just cause to discharge

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[3] Cooper later pleaded guilty to that charge, which was not related to his being in a car with a lighted marijuana cigarette in it. The authorities chose not to prosecute for the latter incident.

[4] The Company asserted that being in a car with a lit marijuana cigarette was a direct violation of the company rule against having an illegal substance on company property. App. 23.

the Grievant under Rule II.1" and, "[i]f not, what if any should be the remedy." App. to Pet. for Cert. 26a.

The arbitrator upheld the grievance and ordered the Company to reinstate Cooper with backpay and full seniority. The arbitrator based his finding that there was not just cause for the discharge on his consideration of seven criteria.[5] In particular, the arbitrator found that the Company failed to prove that the employee had possessed or used marijuana on company property: finding Cooper in the backseat of a car and a burning cigarette in the frontseat ashtray was insufficient proof that Cooper was using or possessed marijuana on company property. *Id.*, at 49a–50a. The arbitrator refused to accept into evidence the fact that marijuana had been found in Cooper's car on company premises because the Company did not know of this fact when Cooper was discharged and therefore did not rely on it as a basis for the discharge.[6]

The Company filed suit in District Court, seeking to vacate the arbitration award on several grounds, one of which was that ordering reinstatement of Cooper, who had allegedly possessed marijuana on the plant premises, was contrary to public policy. The District Court agreed that the award must be set aside as contrary to public policy because it ran

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[5] These considerations were the reasonableness of the employer's position, the notice given to the employee, the timing of the investigation undertaken, the fairness of the investigation, the evidence against the employee, the possibility of discrimination, and the relation of the degree of discipline to the nature of the offense and the employee's past record.

[6] The arbitrator stated: "One of the rules in arbitration is that the Company must have its proof in hand before it takes disciplinary action against an employee. The Company does not take the disciplinary action and then spend eight months digging up supporting evidence to justify its actions. In addition, the use of the gleanings evidence prevented the Grievant from knowing the full extent of the charge against him. Who knows what action the Grievant or the Union would have taken if the gleanings evidence had been made known from the outset of the Company's investigation." App. to Pet. for Cert. 47a.

counter to general safety concerns that arise from the operation of dangerous machinery while under the influence of drugs, as well as to state criminal laws against drug possession. The Court of Appeals affirmed, with one judge dissenting. The court ruled that reinstatement would violate the public policy "against the operation of dangerous machinery by persons under the influence of drugs or alcohol." 768 F. 2d 739, 743 (CA5 1985). The arbitrator had found that Cooper was apprehended on company premises in an atmosphere of marijuana smoke in another's car and that marijuana was found in his own car on the company lot. These facts established that Cooper had violated the Company's rules and gave the Company just cause to discharge him. The arbitrator did not reach this conclusion because of a "narrow focus on Cooper's procedural rights" that led him to ignore what he "knew was in fact true: that Cooper *did* bring marijuana onto his employer's premises." *Ibid.* Even if the arbitrator had not known of this fact at the time he entered his award, "it is doubtful that the award should be enforced today in light of what is now known." *Ibid.*

Because the Courts of Appeals are divided on the question of when courts may set aside arbitration awards as contravening public policy,[7] we granted the Union's petition for a writ of certiorari, 479 U. S. 1029 (1987), and now reverse the judgment of the Court of Appeals.

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[7] The decision below accords with the broader view of the courts' power taken by the First and Seventh Circuits. See, *e. g.*, *United States Postal Service* v. *American Postal Workers Union, AFL–CIO*, 736 F. 2d 822 (CA1 1984); *E. I. DuPont de Nemours and Co.* v. *Grasselli Employees Independent Assn. of East Chicago, Inc.*, 790 F. 2d 611 (CA7), cert. denied, 479 U. S. 853 (1986). A narrower view has been taken by the Ninth and District of Columbia Circuits. See, *e. g.*, *Bevles Co.* v. *Teamsters Local 986*, 791 F. 2d 1391 (CA9 1986); *Northwest Airlines, Inc.* v. *Air Line Pilots Assn. International*, 257 U. S. App. D. C. 181, 808 F. 2d 76 (1987); *American Postal Workers Union* v. *United States Postal Service*, 252 U. S. App. D. C. 169, 789 F. 2d 1 (1986).

II

The Union asserts that an arbitral award may not be set aside on public policy grounds unless the award orders conduct that violates the positive law, which is not the case here. But in the alternative, it submits that even if it is wrong in this regard, the Court of Appeals otherwise exceeded the limited authority that it had to review an arbitrator's award entered pursuant to a collective-bargaining agreement. Respondent, on the other hand, defends the public policy decision of the Court of Appeals but alternatively argues that the judgment below should be affirmed because of erroneous findings by the arbitrator. We deal first with the opposing alternative arguments.

A

Collective-bargaining agreements commonly provide grievance procedures to settle disputes between union and employer with respect to the interpretation and application of the agreement and require binding arbitration for unsettled grievances. In such cases, and this is such a case, the Court made clear almost 30 years ago that the courts play only a limited role when asked to review the decision of an arbitrator. The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract. "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, 596 (1960). As long as the arbitrator's award "draws its essence from the collective bargaining agreement," and is not merely "his own brand of industrial justice," the award is legitimate. *Id.*, at 597.

> "The function of the court is very limited when the parties have agreed to submit all questions of contract inter-

pretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.

"The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim." *Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 567–568 (1960) (emphasis added; footnote omitted).

See also *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U. S. 643, 649–650 (1986).

The reasons for insulating arbitral decisions from judicial review are grounded in the federal statutes regulating labor-management relations. These statutes reflect a decided preference for private settlement of labor disputes without the intervention of government: The Labor Management Relations Act of 1947, 61 Stat. 154, 29 U. S. C. § 173(d), provides that "[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." See also *AT&T Technologies*, *supra*, at 650. The courts have jurisdiction to enforce collective-bargaining contracts; but where the contract provides grievance and arbitration procedures, those procedures must first be exhausted and courts must order resort to the private settlement mechanisms without dealing with the merits of the dispute. Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the mean-

ing of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. To resolve disputes about the application of a collective-bargaining agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. The same is true of the arbitrator's interpretation of the contract. The arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract. *Enterprise Wheel*, *supra*, at 599. So, too, where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect. If the courts were free to intervene on these grounds, the speedy resolution of grievances by private mechanisms would be greatly undermined. Furthermore, it must be remembered that grievance and arbitration procedures are part and parcel of the ongoing process of collective bargaining. It is through these processes that the supplementary rules of the plant are established. As the Court has said, the arbitrator's award settling a dispute with respect to the interpretation or application of a labor agreement must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice. But as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision. Of course, decisions procured by the parties through fraud or through the arbitrator's dishonesty need not be enforced. But there is nothing of that sort involved in this case.

B

The Company's position, simply put, is that the arbitrator committed grievous error in finding that the evidence was insufficient to prove that Cooper had possessed or used marijuana on company property. But the Court of Appeals, although it took a distinctly jaundiced view of the arbitrator's decision in this regard, was not free to refuse enforcement because it considered Cooper's presence in the white Cutlass, in the circumstances, to be ample proof that Rule II.1 was violated. No dishonesty is alleged; only improvident, even silly, factfinding is claimed. This is hardly a sufficient basis for disregarding what the agent appointed by the parties determined to be the historical facts.

Nor was it open to the Court of Appeals to refuse to enforce the award because the arbitrator, in deciding whether there was just cause to discharge, refused to consider evidence unknown to the Company at the time Cooper was fired. The parties bargained for arbitration to settle disputes and were free to set the procedural rules for arbitrators to follow if they chose. Article VI of the agreement, entitled "Arbitration Procedure," did set some ground rules for the arbitration process. It forbade the arbitrator to consider hearsay evidence, for example, but evidentiary matters were otherwise left to the arbitrator. App. 19. Here the arbitrator ruled that in determining whether Cooper had violated Rule II.1, he should not consider evidence not relied on by the employer in ordering the discharge, particularly in a case like this where there was no notice to the employee or the Union prior to the hearing that the Company would attempt to rely on after-discovered evidence. This, in effect, was a construction of what the contract required when deciding discharge cases: an arbitrator was to look only at the evidence before the employer at the time of discharge. As the arbitrator noted, this approach was consistent with the prac-

tice followed by other arbitrators.[8] And it was consistent with our observation in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S 543, 557 (1964), that when the subject matter of a dispute is arbitrable, "procedural" questions which grow out of the dispute and bear on its final disposition are to be left to the arbitrator.

Under the Arbitration Act, the federal courts are empowered to set aside arbitration awards on such grounds only when "the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy." 9 U. S. C. § 10(c). See *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U. S. 145 (1968).[9] If we apply that same standard here and assume that the arbitrator erred in refusing to consider the disputed evidence, his error was not in bad faith or so gross as to amount to affirmative misconduct.[10] Finally, it is worth noting that put-

[8] Labor arbitrators have stated that the correctness of a discharge "must stand or fall upon the reason given at the time of discharge," see, *e. g.*, *West Va. Pulp & Paper Co.*, 10 Lab. Arb. 117, 118 (1947), and arbitrators often, but not always, confine their considerations to the facts known to the employer at the time of the discharge. O. Fairweather, Practice and Procedure in Labor Arbitration 303–306 (2d ed. 1983); F. Elkouri & E. Elkouri, How Arbitration Works 634–635 (3d ed. 1973).

[9] The Arbitration Act does not apply to "contracts of employment of . . . workers engaged in foreign or interstate commerce," 9 U. S. C. § 1, but the federal courts have often looked to the Act for guidance in labor arbitration cases, especially in the wake of the holding that § 301 of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185, empowers the federal courts to fashion rules of federal common law to govern "[s]uits for violation of contracts between an employer and a labor organization" under the federal labor laws. *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957) (construing 29 U. S. C. § 185). See, *e. g.*, *Ludwig Honold Mfg. Co.* v. *Fletcher*, 405 F. 2d 1123 (CA3 1969); *Pietro Scalzitti Co.* v. *International Union of Operating Engineers, Local No. 150*, 351 F. 2d 576 (CA7 1965).

[10] Even in the very rare instances when an arbitrator's procedural aberrations rise to the level of affirmative misconduct, as a rule the court must not foreclose further proceedings by settling the merits according to its own judgment of the appropriate result, since this step would improp-

ting aside the evidence about the marijuana found in Cooper's car during this arbitration did not forever foreclose the Company from using that evidence as the basis for a discharge.

Even if it were open to the Court of Appeals to have found a violation of Rule II.1 because of the marijuana found in Cooper's car, the question remains whether the court could properly set aside the award because in its view discharge was the correct remedy. Normally, an arbitrator is authorized to disagree with the sanction imposed for employee misconduct. In *Enterprise Wheel*, for example, the arbitrator reduced the discipline from discharge to a 10-day suspension. The Court of Appeals refused to enforce the award, but we reversed, explaining that though the arbitrator's decision must draw its essence from the agreement, he "is to bring his informed judgment to bear in order to reach a fair solution of a problem. *This is especially true when it comes to formulating remedies.*" 363 U. S., at 597 (emphasis added). The parties, of course, may limit the discretion of the arbitrator in this respect; and it may be, as the Company argues, that under the contract involved here, it was within the unreviewable discretion of management to discharge an employee once a violation of Rule II.1 was found. But the parties stipulated that the issue before the arbitrator was whether there was "just" cause for the discharge, and the arbitrator, in the course of his opinion, cryptically observed that Rule II.1

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erly substitute a judicial determination for the arbitrator's decision that the parties bargained for in the collective-bargaining agreement. Instead, the court should simply vacate the award, thus leaving open the possibility of further proceedings if they are permitted under the terms of the agreement. The court also has the authority to remand for further proceedings when this step seems appropriate. See, *e. g.*, *Amalgamated Food & Allied Workers Union, Local 56* v. *Great A&P Tea Co.*, 415 F. 2d 185 (CA3 1969) (vacating and remanding to the arbitrators for decision after finding that the arbitrators declined to arbitrate the issues submitted). See also 9 U. S. C. § 10(e) ("Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators").

merely listed causes for discharge and did not expressly provide for immediate discharge. Before disposing of the case on the ground that Rule II.1 had been violated and discharge was therefore proper, the proper course would have been remand to the arbitrator for a definitive construction of the contract in this respect.

C

The Court of Appeals did not purport to take this course in any event. Rather, it held that the evidence of marijuana in Cooper's car required that the award be set aside because to reinstate a person who had brought drugs onto the property was contrary to the public policy "against the operation of dangerous machinery by persons under the influence of drugs or alcohol." 768 F. 2d, at 743. We cannot affirm that judgment.

A court's refusal to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy. *W. R. Grace & Co.* v. *Rubber Workers*, 461 U. S. 757, 766 (1983); *Hurd* v. *Hodge*, 334 U. S. 24, 34–35 (1948). That doctrine derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act, and is further justified by the observation that the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements. *E. g.*, *McMullen* v. *Hoffman*, 174 U. S. 639, 654–655 (1899); *Twin City Pipe Line Co.* v. *Harding Glass Co.*, 283 U. S. 353, 356–358 (1931). In the common law of contracts, this doctrine has served as the foundation for occasional exercises of judicial power to abrogate private agreements.

In *W. R. Grace*, we recognized that "a court may not enforce a collective-bargaining agreement that is contrary to public policy," and stated that "the question of public policy is ultimately one for resolution by the courts." 461 U. S., at 766. We cautioned, however, that a court's refusal to enforce an arbitrator's *interpretation* of such contracts is limited to situations where the contract as interpreted would violate "some explicit public policy" that is "well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *Ibid.* (quoting *Muschany* v. *United States*, 324 U. S. 49, 66 (1945)). In *W. R. Grace*, we identified two important public policies that were potentially jeopardized by the arbitrator's interpretation of the contract: obedience to judicial orders and voluntary compliance with Title VII of the Civil Rights Act of 1964. We went on to hold that enforcement of the arbitration award in that case did not compromise either of the two public policies allegedly threatened by the award. Two points follow from our decision in *W. R. Grace*. First, a court may refuse to enforce a collective-bargaining agreement when the specific terms contained in that agreement violate public policy. Second, it is apparent that our decision in that case does not otherwise sanction a broad judicial power to set aside arbitration awards as against public policy. Although we discussed the effect of that award on two broad areas of public policy, our decision turned on our examination of whether the award created any explicit conflict with other "laws and legal precedents" rather than an assessment of "general considerations of supposed public interests." 461 U. S., at 766. At the very least, an alleged public policy must be properly framed under the approach set out in *W. R. Grace*, and the violation of such a policy must be clearly shown if an award is not to be enforced.

As we see it, the formulation of public policy set out by the Court of Appeals did not comply with the statement that such a policy must be "ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *Ibid.* (quoting *Muschany* v. *United States*, *supra*, at 66). The Court of Appeals made no attempt to review existing laws and legal precedents in order to demonstrate that they establish a "well-defined and dominant" policy against the operation of dangerous machinery while under the influence of drugs. Although certainly such a judgment is firmly rooted in common sense, we explicitly held in *W. R. Grace* that a formulation of public policy based only on "general considerations of supposed public interests" is not the sort that permits a court to set aside an arbitration award that was entered in accordance with a valid collective-bargaining agreement.

Even if the Court of Appeals' formulation of public policy is to be accepted, no violation of that policy was clearly shown in this case. In pursuing its public policy inquiry, the Court of Appeals quite properly considered the established fact that traces of marijuana had been found in Cooper's car. Yet the assumed connection between the marijuana gleanings found in Cooper's car and Cooper's actual use of drugs in the workplace is tenuous at best and provides an insufficient basis for holding that his reinstatement would actually violate the public policy identified by the Court of Appeals "against the operation of dangerous machinery by persons under the influence of drugs or alcohol." 768 F. 2d, at 743. A refusal to enforce an award must rest on more than speculation or assumption.

In any event, it was inappropriate for the Court of Appeals itself to draw the necessary inference. To conclude from the fact that marijuana had been found in Cooper's car that Cooper had ever been or would be under the influence of marijuana while he was on the job and operating dangerous machinery is an exercise in factfinding about Cooper's use of

drugs and his amenability to discipline, a task that exceeds the authority of a court asked to overturn an arbitration award. The parties did not bargain for the facts to be found by a court, but by an arbitrator chosen by them who had more opportunity to observe Cooper and to be familiar with the plant and its problems. Nor does the fact that it is inquiring into a possible violation of public policy excuse a court for doing the arbitrator's task. If additional facts were to be found, the arbitrator should find them in the course of any further effort the Company might have made to discharge Cooper for having had marijuana in his car on company premises. Had the arbitrator found that Cooper had possessed drugs on the property, yet imposed discipline short of discharge because he found as a factual matter that Cooper could be trusted not to use them on the job, the Court of Appeals could not upset the award because of its own view that public policy about plant safety was threatened.[11] In this connection it should also be noted that the award ordered Cooper to be reinstated in his old job or in an equivalent one for which he was qualified. It is by no means clear from the record that Cooper would pose a serious threat to the asserted public policy in every job for which he was qualified.[12]

The judgment of the Court of Appeals is reversed.

So ordered.

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[11] The issue of safety in the workplace is a commonplace issue for arbitrators to consider in discharge cases, and it was a matter for the arbitrator in the first instance to decide whether Cooper's alleged use of drugs on the job would actually pose a danger. That is not a problem here, for the arbitrator recognized that being under the influence of marijuana while operating slitter-rewinder machinery was indeed dangerous, and no one disputed this point.

[12] We need not address the Union's position that a court may refuse to enforce an award on public policy grounds only when the award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN joins, concurring.

I join the Court's opinion, but write separately to underscore the narrow grounds on which its decision rests and to emphasize what it is *not* holding today. In particular, the Court does not reach the issue upon which certiorari was granted: whether a court may refuse to enforce an arbitration award rendered under a collective-bargaining agreement on public policy grounds only when the award itself violates positive law or requires unlawful conduct by the employer. The opinion takes no position on this issue. See *ante*, at 45, n. 12. Nor do I understand the Court to decide, more generally, in what way, if any, a court's authority to set aside an arbitration award on public policy grounds differs from its authority, outside the collective-bargaining context, to refuse to enforce a contract on public policy grounds. Those issues are left for another day.

I agree with the Court that the judgment of the Court of Appeals must be reversed, and I summarize what I understand to be the three alternative rationales for the Court's decision:

1. The Court of Appeals exceeded its authority in concluding that the company's discharge of Cooper was proper under the collective-bargaining agreement. The Court of Appeals erred in considering evidence that the arbitrator legitimately had excluded from the grievance process, in second-guessing the arbitrator's factual finding that Cooper had not violated Rule II.1, and in assessing the appropriate sanction under the agreement. See *Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 567–568 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, 596–597, 599 (1960). Absent its overreaching, the Court of Appeals lacked any basis for disagreeing with the arbitrator's conclusion that there was not "just cause" for discharging Cooper. See *ante*, at 39–42.

2. Even if the Court of Appeals properly considered evidence of marijuana found in Cooper's car and legitimately found a Rule II.1 violation, the public policy advanced by the Court of Appeals does not support its decision to set aside the award. The reinstatement of Cooper would not contravene the alleged public policy "against the operation of dangerous machinery by persons under the influence of drugs or alcohol." 768 F. 2d 739, 743 (CA5 1985). The fact that an employee's car contains marijuana gleanings does not indicate that the employee uses marijuana on the job or that he operates his machine while under the influence of drugs, let alone that he will report to work in an impaired state in the future. See *ante*, at 44. Moreover, nothing in the record suggests that the arbitrator's award, which gives the company the option of placing Cooper in a job equivalent to his old one, would require Cooper to operate hazardous machinery. See *ante*, at 44–45.

3. The public policy formulated by the Court of Appeals may not properly support a court's refusal to enforce an otherwise valid arbitration award. In *W. R. Grace & Co.* v. *Rubber Workers*, 461 U. S. 757 (1983), we stated that the public policy must be founded on "'laws and legal precedents.'" *Id.*, at 766, quoting *Muschany* v. *United States*, 324 U. S. 49, 66 (1945). The Court of Appeals identified no law or legal precedent that demonstrated an "explicit public policy," 461 U. S., at 766, against the operation of dangerous machinery by persons under the influence of drugs. Far from being "well defined and dominant," as *W. R. Grace* prescribed, the Court of Appeals' public policy was ascertained merely "from general considerations of supposed public interests." *Ibid.* See *ante*, at 43. I do not understand the Court, by criticizing the company's public policy formulation, to suggest that proper framing of an alleged public policy under the approach set out in *W. R. Grace* would be sufficient to justify a court's refusal to enforce an arbitration award on public policy grounds. Rather, I understand the

Court to hold that such compliance is merely a necessary step if an award is not to be enforced. See *ante*, at 44.

It is on this understanding that I join the opinion of the Court.

Syllabus

GWALTNEY OF SMITHFIELD, LTD. *v.* CHESAPEAKE BAY FOUNDATION, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 86–473. Argued October 5, 1987—Decided December 1, 1987

Section 505(a) of the Clean Water Act authorizes private citizens to commence a civil action for injunctive relief and/or the imposition of civil penalties in federal district court against any person "alleged to be in violation" of the conditions of a National Pollutant Discharge Elimination System (NPDES) permit. Between 1981 and 1984, petitioner repeatedly violated the conditions of its NPDES permit by exceeding authorized effluent limitations. However, due to the installation of new equipment, petitioner's last reported violation occurred in May 1984. Nevertheless, in June 1984, having given notice of their intent to sue to petitioner, to the Environmental Protection Agency (EPA), and to state authorities, as required by § 505(b) of the Act, respondents filed a § 505(a) suit alleging that petitioner "has violated . . . [and] will continue to violate its NPDES permit." The District Court denied petitioner's motion for dismissal of the action for want of subject-matter jurisdiction under the Act, rejecting the contention that § 505(a)'s "alleged to be in violation" language requires that the defendant be violating the Act at the time of suit, and holding in the alternative that respondents satisfied § 505(a)'s jurisdictional requirements because their complaint alleged in good faith that petitioner was continuing to violate its permit at the time the suit was filed. The Court of Appeals affirmed, agreeing with the District Court that § 505(a) authorizes suits on the basis of wholly past violations, and finding it unnecessary to rule on the District Court's alternative holding.

Held:

1. Section 505(a) does not confer federal jurisdiction over citizen suits for wholly past violations. Pp. 56–63.

(a) Although § 505(a)'s "to be in violation" language is not without ambiguity, the most natural reading of that language is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future. The contention that Congress' failure to choose statutory language that looked to the past is simply the result of a "careless accident" is unpersuasive, since the citizen suit provisions of several other environmental statutes that authorize only prospective re-

lief use language identical to § 505(a)'s, while other statutory provisions demonstrate that Congress knows how to avoid prospective implications by using language that explicitly targets wholly past violations. Also untenable is the argument that, since the EPA compliance order provisions in § 309(a) of the Act use language parallel to the § 505(a) "to be in violation" phrase, since § 309(a) is incorporated by reference into the EPA civil enforcement provisions of § 309(b), and since the EPA may bring enforcement actions to recover civil penalties for wholly past violations, citizens, too, may maintain such actions. Section 309 authorizes equitable relief and the imposition of civil penalties in separate and distinct provisions, including § 309(d), which provides for civil penalties but does not contain language parallel to § 505(a)'s. In contrast, § 505(a)'s reference to civil penalties and injunctive relief in the same sentence suggests a connection between the two remedies, and supports the conclusion that citizens may seek civil penalties only in a suit brought to enjoin or otherwise abate an ongoing violation. Pp. 56–59.

(b) The language and structure of the rest of § 505's citizen suit provisions make plain that the harm sought to be addressed by such a suit lies in the present or future rather than the past, particularly in light of the pervasive and undeviating use of the present tense throughout § 505. Any other conclusion would render gratuitous § 505(b)'s notice provision, the purpose of which is to give the alleged violator an opportunity to bring itself into complete compliance with the Act and thus make a citizen suit unnecessary. Moreover, § 505(b)(1)(B)'s bar on citizen suits once a governmental enforcement action is under way suggests that the citizen suit is meant to supplement, not supplant, governmental action, which supplemental role could be undermined if citizen suits for wholly past violations were permitted, since such a suit might intrude upon governmental discretion to enforce the Act in the public interest. Pp. 59–61.

(c) The Act's legislative history indicates that § 505 suits were intended to abate pollution and to enjoin continuous or intermittent violations, not to remedy wholly past violations. Pp. 61–63.

2. Section 505 confers citizen suit jurisdiction on federal district courts when plaintiffs make a good-faith allegation of continuous or intermittent violation. It is not necessary that plaintiffs prove their allegations of ongoing noncompliance before jurisdiction attaches, since the statute does not require that a defendant "be in violation" at the commencement of suit, but only that the defendant be "*alleged* to be in violation." The good-faith requirement of Federal Rule of Civil Procedure 11 will adequately protect defendants from frivolous allegations. Moreover, allegations of injury are sufficient under this Court's standing cases to invoke the jurisdiction of a court, and the Constitution does not require that the plaintiff offer proof of the allegations as a threshold matter. Furthermore, longstanding mootness doctrine will protect the defendant

from the continuation of suits after the plaintiff's allegations of ongoing violations become false because the defendant has begun to comply with the Act. Since the Court of Appeals declined to decide whether respondents' complaint contained a good-faith allegation of ongoing violation by petitioner, the case must be remanded for consideration of this question. Pp. 64–67.

791 F. 2d 304, vacated and remanded.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, and BLACKMUN, JJ., joined, and in Parts I and II of which STEVENS, O'CONNOR, and SCALIA, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which STEVENS and O'CONNOR, JJ., joined, *post*, p. 67.

E. Barrett Prettyman, Jr., argued the cause for petitioner. With him on the briefs were *Richard J. M. Poulson, Patrick M. Raher, Catherine James LaCroix*, and *John G. Roberts, Jr.*

Louis F. Claiborne argued the cause for respondents. With him on the brief were *Jeter M. Watson* and *James Thornton.**

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States et al. by *Theodore L. Garrett, Katherine L. Rhyne, Robin S. Conrad, James K. Jackson*, and *Richard Wasserstrom;* for the Connecticut Business and Industry Association by *Wayne S. Henderson;* for the Consolidated Rail Corporation et al. by *McNeill Watkins II, James E. Baine, Timothy N. Atherton, Nathan M. Edelstein, Jose A. Berlanga*, and *Grant Van Horne;* and for Rollins Environmental Services (NJ) Inc., by *William H. Lewis, Jr.*

Briefs of *amici curiae* urging affirmance were filed for the United States by *Solicitor General Fried, Acting Assistant Attorney General Hookano, Deputy Solicitor General Wallace, Jeffrey P. Minear*, and *David C. Shilton;* for the State of Alabama et al. by *John K. Van de Kamp*, Attorney General of California, *Roderick E. Walston* and *Allene C. Zanger*, Deputy Attorneys General, *Don Siegelman*, Attorney General of Alabama, *Joseph I. Lieberman*, Attorney General of Connecticut, *Robert E. Walsh*, Assistant Attorney General, *Warren Price III*, Attorney General of Hawaii, *James E. Tierney*, Attorney General of Maine, *Philip Ahrens*, Deputy Attorney General, *Frank J. Kelley*, Attorney General of Michigan, *Louis J. Caruso*, Solicitor General, *William L. Webster*, Attorney General of Missouri, *Louis W. Rose*, Special Assistant Attorney General of New Mexico, *T. Travis Medlock*, Attorney General of South Carolina, *W. J. Michael Cody*, Attorney General of Tennessee, *Jeffrey L. Amestoy*, Attorney

JUSTICE MARSHALL delivered the opinion of the Court.

In this case, we must decide whether § 505(a) of the Clean Water Act, also known as the Federal Water Pollution Control Act, 33 U. S. C. § 1365(a), confers federal jurisdiction over citizen suits for wholly past violations.

I

The Clean Water Act (Act), 86 Stat. 816, 33 U. S. C. § 1251 *et seq.* (1982 ed. and Supp. III), was enacted in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." § 1251(a). In order to achieve these goals, § 301(a) of the Act makes unlawful the discharge of any pollutant into navigable waters except as authorized by specified sections of the Act. 33 U. S. C. § 1311(a).

One of these specified sections is § 402, which establishes the National Pollutant Discharge Elimination System (NPDES). 33 U. S. C. § 1342. Pursuant to § 402(a), the Administrator of the Environmental Protection Agency (EPA) may issue permits authorizing the discharge of pollutants in accordance with specified conditions. § 1342(a). Pursuant to § 402(b), each State may establish and administer its own permit program if the program conforms to federal guidelines and is approved by the Administrator. § 1342(b). The Act calls for the Administrator to suspend the issuance of federal permits as to waters subject to an approved state program. § 1342(c)(1).

The holder of a federal NPDES permit is subject to enforcement action by the Administrator for failure to comply

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General of Vermont, *Mary Sue Terry*, Attorney General of Virginia, and *Kenneth Eikenberry*, Attorney General of Washington; for Friends of the Earth et al. by *Bruce J. Terris;* and for the National Wildlife Federation by *Mark Van Putten* and *Norman L. Dean, Jr.*

Briefs of *amici curiae* were filed for Bethlehem Steel Corporation et al. by *Benjamin Rosenberg;* and for Mid-Atlantic Legal Foundation Inc., et al. by *Richard B. McGlynn.*

with the conditions of the permit. The Administrator's enforcement arsenal includes administrative, civil, and criminal sanctions. § 1319. The holder of a state NPDES permit is subject to both federal and state enforcement action for failure to comply. §§ 1319, 1342(b)(7). In the absence of federal or state enforcement, private citizens may commence civil actions against any person "alleged to be in violation of" the conditions of either a federal or state NPDES permit. § 1365(a)(1). If the citizen prevails in such an action, the court may order injunctive relief and/or impose civil penalties payable to the United States Treasury. § 1365(a).

The Commonwealth of Virginia established a federally approved state NPDES program administered by the Virginia State Water Control Board (Board). Va. Code § 62.1–44.2 *et seq.* (1950). In 1974, the Board issued a NPDES permit to ITT-Gwaltney authorizing the discharge of seven pollutants from the company's meatpacking plant on the Pagan River in Smithfield, Virginia. The permit, which was reissued in 1979 and modified in 1980, established effluent limitations, monitoring requirements, and other conditions of discharge. In 1981, petitioner Gwaltney of Smithfield acquired the assets of ITT-Gwaltney and assumed obligations under the permit.

Between 1981 and 1984, petitioner repeatedly violated the conditions of the permit by exceeding effluent limitations on five of the seven pollutants covered. These violations are chronicled in the Discharge Monitoring Reports that the permit required petitioner to maintain. See 9 Record, Exh. 10. The most substantial of the violations concerned the pollutants fecal coliform, chlorine, and total Kjeldahl nitrogen (TKN). Between October 27, 1981, and August 30, 1984, petitioner violated its TKN limitation 87 times, its chlorine limitation 34 times, and its fecal coliform limitation 31 times. 9 Record, Stipulation, p. 3. Petitioner installed new equipment to improve its chlorination system in March 1982, and its last reported chlorine violation occurred in October 1982.

Id., at 7–8. The new chlorination system also helped to control the discharge of fecal coliform, and the last recorded fecal coliform violation occurred in February 1984. 9 Record, Exh. 10–A. Petitioner installed an upgraded wastewater treatment system in October 1983, and its last reported TKN violation occurred on May 15, 1984. 9 Record, Stipulation, p. 10.

Respondents Chesapeake Bay Foundation and Natural Resources Defense Council, two nonprofit corporations dedicated to the protection of natural resources, sent notice in February 1984 to Gwaltney, the Administrator of EPA, and the Virginia State Water Control Board, indicating respondents' intention to commence a citizen suit under the Act based on petitioner's violations of its permit conditions. Respondents proceeded to file this suit in June 1984, alleging that petitioner "has violated . . . [and] will continue to violate its NPDES permit." 1 Record, Doc. No. 1, p. 5. Respondents requested that the District Court provide declaratory and injunctive relief, impose civil penalties, and award attorney's fees and costs. The District Court granted partial summary judgment for respondents in August 1984, declaring Gwaltney "to have violated and to be in violation" of the Act. No. 84–0366–R (ED Va. Aug. 30, 1984). The District Court then held a trial to determine the appropriate remedy.

Before the District Court reached a decision, Gwaltney moved in May 1985 for dismissal of the action for want of subject-matter jurisdiction under the Act. Gwaltney argued that the language of § 505(a), which permits private citizens to bring suit against any person "alleged to be in violation" of the Act,[1] requires that a defendant be violating the Act at

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[1] In its entirety, § 505(a), as codified, 33 U. S. C. § 1365(a), provides:

"Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

"(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by

the time of suit. Gwaltney urged the District Court to adopt the analysis of the Fifth Circuit in *Hamker* v. *Diamond Shamrock Chemical Co.*, 756 F. 2d 392 (1985), which held that "a complaint brought under [§ 505] must allege a violation occurring at the time the complaint is filed." *Id.*, at 395. Gwaltney contended that because its last recorded violation occurred several weeks before respondents filed their complaint, the District Court lacked subject-matter jurisdiction over respondents' action. See 4 Record, Doc. No. 44.

The District Court rejected Gwaltney's argument, concluding that § 505 authorizes citizens to bring enforcement actions on the basis of wholly past violations. The District Court found that "[t]he words 'to be in violation' may reasonably be read as comprehending unlawful conduct that occurred solely prior to the filing of the lawsuit as well as unlawful conduct that continues into the present." 611 F. Supp. 1542, 1547 (ED Va. 1985). In the District Court's view, this construction of the statutory language was supported by the legislative history and the underlying policy goals of the Act. *Id.*, at 1550. The District Court held in the alternative that respondents satisfied the jurisdictional requirements of § 505 because their complaint alleged in good faith that Gwaltney was continuing to violate its permit at the time the suit was filed. *Id.*, at 1549, n. 8.

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the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

"(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

"The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title."

The Court of Appeals affirmed, expressly rejecting the Fifth Circuit's approach in *Hamker* and holding that § 505 "can be read to comprehend unlawful conduct that occurred only prior to the filing of a lawsuit as well as unlawful conduct that continues into the present." 791 F. 2d 304, 309 (CA4 1986). The Court of Appeals concluded that its reading of § 505 was consistent with the Act's structure, legislative history, and purpose. Although it observed that "[a] very sound argument can be made that [respondents'] allegations of continuing violations were made in good faith," the Court of Appeals declined to rule on the District Court's alternative holding, finding it unnecessary to the disposition of the case. *Id.*, at 308, n. 9.

Subsequent to the issuance of the Fourth Circuit's opinion, the First Circuit also had occasion to construe § 505. It took a position different from that of either the Fourth or the Fifth Circuit, holding that jurisdiction lies under § 505 when "the citizen-plaintiff fairly alleges a continuing likelihood that the defendant, if not enjoined, will again proceed to violate the Act." *Pawtuxet Cove Marina, Inc.* v. *Ciba-Geigy Corp.*, 807 F. 2d 1089, 1094 (1986). The First Circuit's approach precludes suit based on wholly past violations, but permits suit when there is a pattern of intermittent violations, even if there is no violation at the moment suit is filed. We granted certiorari to resolve this three-way conflict in the Circuits. 479 U. S. 1029 (1987). We now vacate the Fourth Circuit's opinion and remand the case.

II

A

It is well settled that "the starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980). The Court of Appeals concluded that the "to be in violation" language of § 505 is ambiguous, whereas petitioner asserts that it plainly precludes the construction

adopted below. We must agree with the Court of Appeals that § 505 is not a provision in which Congress' limpid prose puts an end to all dispute. But to acknowledge ambiguity is not to conclude that all interpretations are equally plausible. The most natural reading of "to be in violation" is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future. Congress could have phrased its requirement in language that looked to the past ("to have violated"), but it did not choose this readily available option.

Respondents urge that the choice of the phrase "to be in violation," rather than phrasing more clearly directed to the past, is a "careless accident," the result of a "debatable lapse of syntactical precision." Brief for Respondents 8. But the prospective orientation of that phrase could not have escaped Congress' attention. Congress used identical language in the citizen suit provisions of several other environmental statutes that authorize only prospective relief. See, *e. g.*, Clean Air Act, 42 U. S. C. § 7604; Resource Conservation and Recovery Act of 1976, 42 U. S. C. § 6972 (1982 ed. and Supp. III); Toxic Substances Control Act, 15 U. S. C. § 2619 (1982 ed. and Supp. IV). Moreover, Congress has demonstrated in yet other statutory provisions that it knows how to avoid this prospective implication by using language that explicitly targets wholly past violations.[2]

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[2] For example, the Solid Waste Disposal Act was amended in 1984 to authorize citizen suits against any "past or present" generator, transporter, owner, or operator of a treatment, storage, or disposal facility "who has contributed or who is contributing" to the "past or present" handling, storage, treatment, transportation, or disposal of certain hazardous wastes. 42 U. S. C. § 6972(a)(1)(B) (1982 ed., Supp. III). Prior to 1984, the Solid Waste Disposal Act contained language identical to that of § 505(a) of the Clean Water Act, authorizing citizen suits against any person "alleged to be in violation" of waste disposal permits or standards. 42 U. S. C. § 6972(a)(1). Even more on point, the most recent Clean Water Act amendments permit EPA to assess administrative penalties without

Respondents seek to counter this reasoning by observing that Congress also used the phrase "is in violation" in § 309(a) of the Act, which authorizes the Administrator of EPA to issue compliance orders. 33 U. S. C. § 1319(a). That language is incorporated by reference in § 309(b), which authorizes the Administrator to bring civil enforcement actions. § 1319(b). Because it is little questioned that the Administrator may bring enforcement actions to recover civil penalties for wholly past violations, respondents contend, the parallel language of § 309(a) and § 505(a) must mean that citizens, too, may maintain such actions.

Although this argument has some initial plausibility, it cannot withstand close scrutiny and comparison of the two statutory provisions. The Administrator's ability to seek civil penalties is not discussed in either § 309(a) or § 309(b); civil penalties are not mentioned until § 309(d), which does not contain the "is in violation" language. 33 U. S. C. § 1319(d). This Court recently has recognized that § 309(d) constitutes a separate grant of enforcement authority:

> "Section 1319 [§ 309] does not intertwine equitable relief with the imposition of civil penalties. Instead each kind of relief is separably authorized in a separate and distinct statutory provision. Subsection (b), providing injunctive relief, is independent of subsection (d), which provides only for civil penalties." *Tull* v. *United States*, 481 U. S. 412, 425 (1987).

In contrast, § 505 of the Act does not authorize civil penalties separately from injunctive relief; rather, the two forms of relief are referred to in the same subsection, even in the same sentence. 33 U. S. C. § 1365(a). The citizen suit provision suggests a connection between injunctive relief and civil penalties that is noticeably absent from the provision authorizing agency enforcement. A comparison of § 309 and § 505 thus

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judicial process on any person who "has violated" the provisions of the Act. Water Quality Act of 1987, § 314, Pub. L. 100–4, 101 Stat. 46.

supports rather than refutes our conclusion that citizens, unlike the Administrator, may seek civil penalties only in a suit brought to enjoin or otherwise abate an ongoing violation.

B

Our reading of the "to be in violation" language of § 505(a) is bolstered by the language and structure of the rest of the citizen suit provisions in § 505 of the Act. These provisions together make plain that the interest of the citizen-plaintiff is primarily forward-looking.

One of the most striking indicia of the prospective orientation of the citizen suit is the pervasive use of the present tense throughout § 505. A citizen suit may be brought only for violation of a permit limitation "which is in effect" under the Act. 33 U. S. C. § 1365(f). Citizen-plaintiffs must give notice to the alleged violator, the Administrator of EPA, and the State in which the alleged violation "occurs." § 1365(b)(1)(A). A Governor of a State may sue as a citizen when the Administrator fails to enforce an effluent limitation "the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State." § 1365(h). The most telling use of the present tense is in the definition of "citizen" as "a person . . . having an interest which is or may be adversely affected" by the defendant's violations of the Act. § 1365(g). This definition makes plain what the undeviating use of the present tense strongly suggests: the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past.

Any other conclusion would render incomprehensible § 505's notice provision, which requires citizens to give 60 days' notice of their intent to sue to the alleged violator as well as to the Administrator and the State. § 1365(b)(1)(A). If the Administrator or the State commences enforcement action within that 60-day period, the citizen suit is barred, presumably because governmental action has rendered it un-

necessary.[3] § 1365(b)(1)(B). It follows logically that the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit. If we assume, as respondents urge, that citizen suits may target wholly past violations, the requirement of notice to the alleged violator becomes gratuitous. Indeed, respondents, in propounding their interpretation of the Act, can think of no reason for Congress to require such notice other than that "it seemed right" to inform an alleged violator that it was about to be sued. Brief for Respondents 14.

Adopting respondents' interpretation of § 505's jurisdictional grant would create a second and even more disturbing anomaly. The bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action. The legislative history of the Act reinforces this view of the role of the citizen suit. The Senate Report noted that "[t]he Committee intends the great volume of enforcement actions [to] be brought by the State," and that citizen suits are proper only "if the Federal, State, and local agencies fail to exercise their enforcement responsibility." S. Rep. No. 92–414, p. 64 (1971), reprinted in 2 A Legislative History of the Water Pollution Control Act Amendments of 1972, p. 1482 (1973) (hereinafter Leg. Hist.). Permitting citizen suits for wholly past violations of the Act could undermine the supplementary role envisioned for the citizen suit. This danger is best illustrated by an example. Suppose that the Administrator identified a violator of the Act and issued a compliance order under § 309(a). Suppose further that the

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[3] The notice provisions specifically provide that citizen suits are barred only if the Administrator or State has commenced an action *"to require compliance."* 33 U. S. C. § 1365(b)(1)(B) (emphasis added). This language supports our conclusion that the precluded citizen suit is also an action for compliance, rather than an action solely for civil penalties for past, nonrecurring violations.

Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take. If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably. The same might be said of the discretion of state enforcement authorities. Respondents' interpretation of the scope of the citizen suit would change the nature of the citizens' role from interstitial to potentially intrusive. We cannot agree that Congress intended such a result.

C

The legislative history of the Act provides additional support for our reading of § 505. Members of Congress frequently characterized the citizen suit provisions as "abatement" provisions or as injunctive measures. See, *e. g.*, Water Pollution Control Legislation, Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 92d Cong., 1st Sess., pt. 1, p. 114 (1971) (staff analysis of S. 523) ("Any person may sue a polluter to abate a violation . . ."); *id.*, pt. 2, at 707 (Sen. Eagleton) ("Citizen suits . . . are brought for the purpose of abating pollution"); H. R. Rep. No. 92–911, p. 407 (1972), 1 Leg. Hist. 876 (additional views of Reps. Abzug and Rangel) ("[C]itizens may institute suits against polluters for the purpose of halting that pollution"); 118 Cong. Rec. 33693 (1972), 1 Leg. Hist. 163 (Sen. Muskie) ("Citizen suits can be brought to enforce against both continuous and intermittent violations"); *id.*, at 33717, 1 Leg. Hist. 221 (Sen. Bayh) ("These sorts of citizen suits—in which a citizen can obtain an injunction but cannot obtain money damages for himself—are a very useful additional tool in enforcing environmental protection laws").

Moreover, both the Senate and House Reports explicitly connected § 505 to the citizen suit provisions authorized by the Clean Air Act, which are wholly injunctive in nature. See S. Rep. No. 92–414, *supra*, at 79, 2 Leg. Hist. 1497 (Citizen participation under the Clean Water Act is "modeled on the provision enacted in the Clean Air Amendments of 1970"); H. R. Rep. No. 92–911, *supra*, at 133, 1 Leg. Hist. 820 ("Section 505 closely follows the concepts utilized in section 304 of the Clean Air Act"). Congress' acknowledgment of this connection suggests that the identity of the "alleged to be in violation" language of the citizen suit provisions of the two Acts is not accidental; rather, the two provisions share the common central purpose of permitting citizens to abate pollution when the government cannot or will not command compliance. This understanding of the "alleged to be in violation" language as a statutory term of art rather than a mere stylistic infelicity is reinforced by the consistent adherence in the Senate and House Reports to the precise statutory formulation. See, *e. g.*, S. Conf. Rep. No. 92–1236, p. 145 (1972), 1 Leg. Hist. 328; H. R. Rep. No. 92–911, *supra*, at 133, 1 Leg. Hist. 820; S. Rep. No. 92–414, *supra*, at 79, 2 Leg. Hist. 1497.

Respondents make much of the fact that Senator Muskie, one of the principal authors and sponsors of the bill, deviated from this formulation at one point, expressing the view that "a citizen has a right under section 505 to bring an action for an appropriate remedy in the case of any person who is alleged to be, *or to have been*, in violation." 118 Cong. Rec. 33700 (1972), 1 Leg. Hist. 179 (emphasis added). When viewed in context, however, Senator Muskie's statement does not support respondents' contention that § 505 authorizes citizen suits for wholly past violations. The full context of the Senator's remarks is as follows:

> "This 60-day [notice] provision was not intended, however, to cut off the right of action a citizen may have [with respect] to violations that took place 60 days ear-

> lier but which may not have been continuous. As in the original Senate bill, a citizen has a right under section 505 to bring an action for an approprate remedy in the case of any person who is alleged to be, or to have been, in violation, whether the violation be a continuous one, or an occasional or sporadic one." *Ibid.*

The surrounding text strongly suggests that Senator Muskie used the past tense in order to make clear that an intermittent polluter—one who violates permit limitations one month out of every three—is just as much "in violation" of the Act as a continuous violator. His reference to "occasional or sporadic" violations cannot fairly be read to include "wholly past" violations, as respondents contend. Our understanding of Senator Muskie's written remarks is supported by the Senator's oral summary of his written views for his colleagues. In summarizing, Senator Muskie stated merely that "[c]itizen suits can be brought to enforce against both continuous and intermittent violations." *Id.*, at 33693, 1 Leg. Hist. 163. Noticeably lacking here, too, is any reference to wholly past violations. Senator Muskie's remarks cannot bear the weight that respondents place on them.[4]

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[4] Respondents also seek to rely on the legislative history of the 1987 amendments to the Act, which, *inter alia*, gave the Administrator authority to assess civil penalties for past violations without judicial enforcement proceedings. Water Quality Act of 1987, § 314, Pub. L. 100–4, 101 Stat. 46. Respondents point to provisions in the 1987 Act and statements in its legislative history to the effect that an administrative penalty action for violation of one effluent limitation does not bar a citizen suit for a past violation of another effluent limitation, even if the two violations resulted from the same discharge. Brief for Respondents 17–18, and n. 11. Respondents contend that this evidence demonstrates that the 99th Congress viewed the Act as permitting citizen suits for wholly past violations. The conclusions of the 99th Congress, however, are hardly probative of the intent of the 92d Congress. See *Rainwater* v. *United States*, 356 U. S. 590, 593 (1958). Moreover, the provisions and legislative history of the 1987 Act support arguments that cut against respondents as well. The fact that Congress consciously chose the past tense to describe the Administrator's new authority to assess civil penalties suggests that Congress

III

Our conclusion that § 505 does not permit citizen suits for wholly past violations does not necessarily dispose of this lawsuit, as both lower courts recognized. The District Court found persuasive the fact that "[respondents'] allegation in the complaint, that Gwaltney was continuing to violate its NPDES permit when plaintiffs filed suit[,] appears to have been made fully in good faith." 611 F. Supp., at 1549, n. 8. On this basis, the District Court explicitly held, albeit in a footnote, that "even if Gwaltney were correct that a district court has no jurisdiction over citizen suits based entirely on unlawful conduct that occurred entirely in the past, the Court would still have jurisdiction here." *Ibid.* The Court of Appeals acknowledged, also in a footnote, that "[a] very sound argument can be made that [respondents'] allegations of continuing violations were made in good faith," 791 F. 2d, at 308, n. 9, but expressly declined to rule on this alternative holding. Because we agree that § 505 confers jurisdiction over citizen suits when the citizen-plaintiffs make a good-faith allegation of continuous or intermittent violation, we remand the case to the Court of Appeals for further consideration.

Petitioner argues that citizen-plaintiffs must prove their allegations of ongoing noncompliance before jurisdiction attaches under § 505. Brief for Petitioner 37–43. We cannot agree. The statute does not require that a defendant "be in violation" of the Act at the commencement of suit; rather, the statute requires that a defendant be "*alleged* to be in violation." Petitioner's construction of the Act reads the word "alleged" out of § 505. As petitioner itself is quick

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knows how to target past violations when it wants to do so. See n. 2, *supra*. The legislative history demonstrates that the Senate and House bills were in conflict on whether to adopt the present or past tense, compare H. R. Rep. No. 99–189, p. 89 (1985), with S. Rep. No. 99–50, pp. 26, 100 (1985), and the Act reflects that Congress chose to adopt the past tense from the Senate bill.

to note in other contexts, there is no reason to believe that Congress' drafting of § 505 was sloppy or haphazard. We agree with the Solicitor General that "Congress's use of the phrase 'alleged to be in violation' reflects a conscious sensitivity to the practical difficulties of detecting and proving chronic episodic violations of environmental standards." Brief for United States as *Amicus Curiae* 18. Our acknowledgment that Congress intended a good-faith allegation to suffice for jurisdictional purposes, however, does not give litigants license to flood the courts with suits premised on baseless allegations. Rule 11 of the Federal Rules of Civil Procedure, which requires pleadings to be based on a good-faith belief, formed after reasonable inquiry, that they are "well grounded in fact," adequately protects defendants from frivolous allegations.

Petitioner contends that failure to require proof of allegations under § 505 would permit plaintiffs whose allegations of ongoing violation are reasonable but untrue to maintain suit in federal court even though they lack constitutional standing. Petitioner reasons that if a defendant is in complete compliance with the Act at the time of suit, plaintiffs have suffered no injury remediable by the citizen suit provisions of the Act. Petitioner, however, fails to recognize that our standing cases uniformly recognize that allegations of injury are sufficient to invoke the jurisdiction of a court. In *Warth* v. *Seldin*, 422 U. S. 490, 501 (1975), for example, we made clear that a suit will not be dismissed for lack of standing if there are sufficient "allegations of fact"—not proof—in the complaint or supporting affidavits.[5] This is not to say,

[5] See also *Warth* v. *Seldin*, 422 U. S., at 501 ("Art. III's requirement remains: the plaintiff still must *allege* a distinct and palpable injury to himself . . .") (emphasis added); *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617 (1973) ("[W]e have steadfastly adhered to the requirement that . . . federal plaintiffs must *allege* some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction") (footnotes omitted; emphasis added); *Baker* v. *Carr*, 369 U. S. 186, 204 (1962) ("Have the [plaintiffs] *alleged* such a personal stake in the outcome

however, that such allegations may not be challenged. In *United States* v. *SCRAP*, 412 U. S. 669, 689 (1973), we noted that if the plaintiffs' "allegations [of standing] were in fact untrue, then the [defendants] should have moved for summary judgment on the standing issue and demonstrated to the District Court that the allegations were sham and raised no genuine issue of fact." If the defendant fails to make such a showing after the plaintiff offers evidence to support the allegation, the case proceeds to trial on the merits, where the plaintiff must prove the allegations in order to prevail. But the Constitution does not require that the plaintiff offer this proof as a threshold matter in order to invoke the District Court's jurisdiction.

Petitioner also worries that our construction of § 505 would permit citizen-plaintiffs, if their allegations of ongoing noncompliance become false at some later point in the litigation because the defendant begins to comply with the Act, to continue nonetheless to press their suit to conclusion. According to petitioner, such a result would contravene both the prospective purpose of the citizen suit provisions and the "case or controversy" requirement of Article III. Longstanding principles of mootness, however, prevent the maintenance of suit when "'there is no reasonable expectation that the wrong will be repeated.'" *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953) (quoting *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 448 (CA2 1945)). In seeking to have a case dismissed as moot, however, the defendant's burden "is a heavy one." 345 U. S., at 633. The defendant must demonstrate that it is "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *United States* v. *Phosphate Export Assn., Inc.*, 393 U. S. 199, 203 (1968) (emphasis added). Mootness doctrine thus protects defendants from the mainte-

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of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions?") (emphasis added).

nance of suit under the Clean Water Act based solely on violations wholly unconnected to any present or future wrongdoing, while it also protects plaintiffs from defendants who seek to evade sanction by predictable "protestations of repentance and reform." *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 333 (1952).[6]

Because the court below erroneously concluded that respondents could maintain an action based on wholly past violations of the Act, it declined to decide whether respondents' complaint contained a good-faith allegation of ongoing violation by petitioner. We therefore remand the case for consideration of this question. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE STEVENS and JUSTICE O'CONNOR join, concurring in part and concurring in the judgment.

I join Parts I and II of the Court's opinion. I cannot join Part III because I believe it misreads the statute to create a peculiar new form of subject-matter jurisdiction.

I

The Court concludes that subject-matter jurisdiction exists under § 505 if there is a good-faith allegation that the defendant is "in violation." Thereafter, according to the Court's in-

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[6] Under the Act, plaintiffs are also protected from the suddenly repentant defendant by the authority of the district courts to award litigation costs "whenever the court determines such award is appropriate." 33 U. S. C. § 1365(d). The legislative history of this provision states explicitly that the award of costs "should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions." S. Rep. No. 92–414, p. 81 (1971), 2 Leg. Hist. 1499.

terpretation, the plaintiff can never be called on to prove that jurisdictional allegation. *Ante*, at 65. This creates a regime that is not only extraordinary, but to my knowledge unique. I can think of no other context in which, in order to carry a lawsuit to judgment, allegations are necessary but proof of those allegations (if they are contested) is not. The Court thinks it necessary to find that Congress produced this jurisprudential anomaly because any other conclusion, in its view, would read the word "alleged" out of § 505. It seems to me that, quite to the contrary, it is the Court's interpretation that ignores the words of the statute.

Section 505(a) states that "any citizen may *commence* a civil action on his own behalf . . . against any person . . . who is alleged to be in violation . . ." (emphasis added). There is of course nothing unusual in the proposition that only an allegation is required to *commence* a lawsuit. Proof is never required, and could not practicably be required, at that stage. From this clear and unexceptionable language of the statute, one of two further inferences can be made: (1) The inference the Court chooses, that the requirement for commencing a suit is the same as the requirement for maintaining it, or (2) the inference that, in order to maintain a suit the allegations that are required to commence it must, if contested, be proved. It seems to me that to favor the first inference over the second is to prefer the eccentric to the routine. It is well ingrained in the law that subject-matter jurisdiction can be called into question *either* by challenging the sufficiency of the allegation *or* by challenging the accuracy of the jurisdictional facts alleged. See, *e. g.*, *Land* v. *Dollar*, 330 U. S. 731, 735, n. 4 (1947); *Thomson* v. *Gaskill*, 315 U. S. 442, 446 (1942); *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269, 278 (1936); *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 189 (1936). Had Congress intended us to eliminate the second form of challenge, and to create an extraordinary regime in which the jurisdictional fact consists of a good-faith belief, it seems to me it would have delivered those

instructions in more clear fashion than merely specifying how a lawsuit can be commenced.

In my view, therefore, the issue to be resolved by the Court of Appeals on remand of this suit is not whether the allegation of a continuing violation on the day suit was brought was made in good faith after reasonable inquiry, but whether petitioner was in fact "in violation" on the date suit was brought. The phrase in § 505(a), "to be in violation," unlike the phrase "to be violating" or "to have committed a violation," suggests a state rather than an act—the opposite of a state of compliance. A good or lucky day is not a state of compliance. Nor is the dubious state in which a past effluent problem is not recurring at the moment but the cause of that problem has not been completely and clearly eradicated. When a company has violated an effluent standard or limitation, it remains, for purposes of § 505(a), "in violation" of that standard or limitation so long as it has not put in place remedial measures that clearly eliminate the cause of the violation. It does not suffice to defeat subject-matter jurisdiction that the success of the attempted remedies becomes clear months or even weeks after the suit is filed. Subject-matter jurisdiction "depends on the state of things at the time of the action brought"; if it existed when the suit was brought, "subsequent events" cannot "ous[t]" the court of jurisdiction. *Mollan* v. *Torrance*, 9 Wheat. 537, 539 (1824); see, *e. g.*, *Smith* v. *Sperling*, 354 U. S. 91, 93, n. 1 (1957); *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 289–290 (1938). It is this requirement of clarity of cure for a past violation, contained in the phrase "to be in violation," rather than a novel theory of subject-matter jurisdiction by good-faith allegation, that meets the Court's concern for "'the practical difficulties of detecting and proving chronic episodic violations,'" *ante*, at 65, quoting Brief for United States as *Amicus Curiae* 18.

Thus, I think the question on remand should be whether petitioner had taken remedial steps that had clearly achieved

the effect of curing all past violations by the time suit was brought. I cannot claim that the Court's standard and mine would differ greatly in their practical application. They would, for example, almost certainly produce identical results in this lawsuit. See 611 F. Supp. 1542, 1549, n. 8 (ED Va. 1985) (District Court, in stating that allegation of continuing violation was in good faith, relied entirely on post-complaint uncertainty as to whether cause of TKN violation was cured). This practical insignificance, however, makes all the more puzzling the Court's willingness to impute to Congress creation of an unprecedented scheme where that which must be alleged need not be proved.

II

Even if the Court were correct that no evidence of a state of noncompliance has to be produced to survive a motion for dismissal on grounds of subject-matter jurisdiction, such evidence would still be required in order to establish the plaintiff's standing. While Gwaltney did not seek certiorari (or even appeal to the Court of Appeals) on the denial of its motion to dismiss for lack of standing, it did raise the standing issue before us here, see Reply Brief for Petitioner 17–18, and we in any event have an independent obligation to inquire into standing where it is doubtful, see *Bender* v. *Williamsport Area School Dist.*, 475 U. S. 534, 541 (1986). If it is undisputed that the defendant was in a state of compliance when this suit was filed, the plaintiffs would have been suffering no remediable injury in fact that could support suit. The constitutional requirement for such injury is reflected in the statute itself, which defines "citizen" as one who has "an interest which is or may be adversely affected." 33 U. S. C. § 1365(g). See *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1, 16 (1981).

Accordingly, even on the Court's theory of this case it seems to me that the remand should require the lower court to consider not just good-faith allegation of a state of violation

but its actual existence. To be sure, nothing in the Court's opinion *precludes* such consideration of standing, but under sound practice the remand should *require* it. See, *e. g.*, *Havens Realty Corp.* v. *Coleman*, 455 U. S. 363, 378 (1982); *Combs* v. *United States*, 408 U. S. 224, 227–228 (1972) *(per curiam)*. Of course that disposition would call attention to the fact that we have interpreted the statute to confer subject-matter jurisdiction over a class of cases in which, by the terms of the statute itself, there cannot possibly be standing to sue.

KARCHER, SPEAKER OF THE NEW JERSEY GENERAL ASSEMBLY, ET AL. *v.* MAY ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 85–1551. Argued October 6, 1987—Decided December 1, 1987

Within a month after the effective date of a New Jersey statute requiring primary and secondary public school educators to permit students to observe a minute of silence before the start of each schoolday "for quiet and private contemplation or introspection," appellees—a teacher, several students, and parents—filed suit in Federal District Court under 42 U. S. C. § 1983 claiming that the statute violated the Establishment Clause of the First Amendment. When it became apparent that neither the State's Attorney General nor the named defendants—the State Department of Education, its Commissioner, and two local boards of education—would defend the statute, the then-presiding Speaker of the New Jersey General Assembly and the President of the State Senate (hereafter appellants) sought and obtained permission to intervene as defendants on behalf of the legislature, and thereafter carried the entire burden of defending the statute. The District Court declared the statute unconstitutional, and the Court of Appeals affirmed. After appellants lost their posts as presiding legislative officers, they filed a notice in this Court appealing the judgment under 28 U. S. C. § 1254(2). Appellants' counsel having informed the Court that the new presiding legislative officers were withdrawing the legislature's appeal, appellees moved to dismiss on the ground that the withdrawal left the Court without a case or controversy.

Held:

1. The appeal must be dismissed for want of jurisdiction. Appellants intervened and participated throughout this lawsuit only in their official capacities as presiding officers on behalf of the state legislature. They no longer hold those offices, and the authority to pursue the lawsuit on behalf of the legislature has passed to their successors under Federal Rule of Appellate Procedure 43(c)(1). Their successors have withdrawn the legislature's appeal. Moreover, appellants' intervention and participation as presiding legislative officers does not entitle them to appeal in their newly asserted roles as individual legislators and as representatives of the majority of the now-expired legislature that enacted the statute. The record establishes that, throughout the proceedings in this case, appellants never sought or asserted participation in either of those

capacities, and that the only real party-intervenor was the incumbent legislature. Thus, appellants are not "parties" entitled to appeal the Court of Appeals' judgment under § 1254(2). Pp. 77–81.

2. Dismissal of the appeal does not require that the judgments below be vacated. The contention that no proper party-defendant ever intervened in the case because New Jersey law does not authorize the presiding legislative officers to represent the legislature in litigation not only is directly contrary to appellants' explicit representations to the District Court, but appears to be wrong as a matter of state law since the New Jersey Supreme Court has granted applications by the presiding legislative officers to intervene as parties-respondent on behalf of the legislature in defense of a legislative enactment. Moreover, this Court's procedure, under *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, of vacating lower court judgments when a case becomes moot on appeal in order to allow future relitigation of the issues between the parties and to eliminate a judgment rendered "unreviewable" by happenstance is inapplicable to this case. This controversy did not become moot, nor was the judgment here rendered unreviewable, by appellants' loss of official status. Rather, the authority to pursue the appeal on behalf of the legislature passed to appellants' successors in office, and the controversy ended when the legislature declined to pursue its appeal. Pp. 81–83.

Appeal dismissed. Reported below: 780 F. 2d 240.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, MARSHALL, BLACKMUN, STEVENS, and SCALIA, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 83.

Rex E. Lee argued the cause for appellants. With him on the briefs were *William W. Robertson, Dean A. Gaver, Robert P. Zoller*, and *Carter G. Phillips*.

Norman L. Cantor argued the cause for appellees. With him on the briefs were *Richard M. Altman, John A. Powell*, and *Eric Neisser*.*

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Fried, Assistant Attorney General Reynolds, Deputy Solicitor General Ayer, Deputy Assistant Attorney General Carvin, Andrew J. Pincus, David K. Flynn*, and *Dennis J. Dimsey;* for the State of Connecticut et al. by *Joseph I. Lieberman*, Attorney General of Connecticut, *Barney Lapp, Henry S. Cohn*, and *Carl J. Schuman*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Robert K. Corbin* of Arizona, *Charles M. Oberly III* of Delaware,

JUSTICE O'CONNOR delivered the opinion of the Court.

Alan J. Karcher and Carmen A. Orechio, the former presiding officers of the New Jersey Legislature, seek to appeal a judgment declaring a New Jersey statute unconstitutional. Their appeal presents the question whether public officials who have participated in a lawsuit solely in their official capacities may appeal an adverse judgment after they have left office. We hold that they may not.

I

In December 1982 the New Jersey Legislature enacted, over the Governor's veto, a statute requiring the State's primary and secondary public school educators to permit their students to observe a minute of silence before the start of each schoolday. The statute reads as follows:

> "Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual stu-

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Linley E. Pearson of Indiana, *William J. Guste, Jr.*, of Louisiana, *Frank J. Kelley* of Michigan, *Brian McKay* of Nevada, and *Hal Stratton* of New Mexico; for the Catholic League for Religious and Civil Rights by *Steven Frederick McDowell;* for the Rutherford Institute et al. by *John W. Whitehead, David E. Morris, Alfred J. Lindh, Ira W. Still III, William B. Hollberg, Randall A. Pentiuk, Thomas W. Strahan, John F. Southworth, Jr.*, and *W. Charles Bundren;* and for Ronald Sokalski et al. by *Rex E. Lee, Carter G. Phillips, Richard G. Wilkins, Michael J. Woodruff,* and *Samuel E. Ericsson.*

Briefs of *amici curiae* urging affirmance were filed for the American Association of School Administrators by *David S. Tatel, Walter A. Smith, Jr.*, and *Elizabeth B. Heffernan;* for the American Jewish Congress et al. by *Sheldon H. Elsen* and *Clement J. Colucci;* for Americans United for Separation of Church and State et al. by *Lee Boothby* and *James M. Parker;* for the Anti-Defamation League of B'nai B'rith et al. by *Ruti G. Teitel, Justin J. Finger, Meyer Eisenberg, Jeffrey P. Sinensky,* and *Steven M. Freeman;* for the New Jersey Council of Churches et al. by *Donald L. Drakeman;* and for the New Jersey Education Association by *James R. Zazzali* and *Kenneth I. Nowak.*

> dent, before the opening exercises of each school day for quiet and private contemplation or introspection." N. J. Stat. Ann. § 18A:36–4 (West Supp. 1987).

The New Jersey Attorney General immediately announced that he would not defend the statute if it were challenged. The statute became effective December 17, 1982, and within a month appellees—a New Jersey public school teacher, several public school students, and parents of public school students—challenged its constitutionality in federal court. Appellees sued under 42 U. S. C. § 1983, alleging that the statute violated the Establishment Clause of the First Amendment and seeking both declaratory and injunctive relief. They named as defendants the New Jersey Department of Education, its Commissioner, and two township boards of education.

When it became apparent that neither the Attorney General nor the named defendants would defend the statute, Karcher and Orechio, as Speaker of the New Jersey General Assembly and President of the New Jersey Senate, respectively, sought and obtained permission to intervene as defendants on behalf of the legislature. Appellees entered into a stipulation dismissing the suit against the named defendants, but the District Court refused to accept the stipulation out of concern for the effect it might have on the jurisdictional posture of the case. The legislature, through its presiding officers, carried the entire burden of defending the statute.

After a 5-day trial, the District Court declared the New Jersey statute unconstitutional. Applying the test set out in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), the court held that the statute violated the Establishment Clause of the First Amendment because its purpose was religious rather than secular, because it both advanced and inhibited religion, and because it fostered excessive government entanglement with religion. *May* v. *Cooperman*, 572 F. Supp. 1561 (NJ 1983).

Karcher and Orechio appealed from the District Court's judgment in their official capacities as Speaker of the New Jersey General Assembly and President of the New Jersey Senate. The named defendants filed letters with the Court of Appeals stating that they would not participate in the appeal, except to the extent necessary to protect themselves from having to pay attorney's fees.

The Court of Appeals affirmed the District Court's declaratory judgment by a divided vote. The majority held that the statute did not promote or inhibit religion and would not foster excessive entanglement between government and religion, but affirmed the District Court's conclusion that the statute violated the Establishment Clause for lack of a valid secular purpose. The dissent concluded that the evidence was not sufficient to prove the absence of a secular legislative purpose. The Court of Appeals entered its judgment of affirmance on December 24, 1985. *May* v. *Cooperman*, 780 F. 2d 240 (CA3 1985).

On January 14, 1986, Karcher and Orechio lost their posts as presiding legislative officers. Charles Hardwick replaced Karcher as Speaker of the New Jersey General Assembly. John Russo succeeded Orechio as President of the New Jersey Senate.

A March 19, 1986, notice appealing the judgment of the Court of Appeals to this Court was filed on behalf of "Alan J. Karcher, as Speaker of the New Jersey General Assembly; the New Jersey General Assembly; Carmen A. Orechio, as President of the New Jersey Senate and the New Jersey Senate." App. to Juris. Statement 106a–107a. By letter dated May 6, 1986, appellants' counsel informed us that Senate President Russo and General Assembly Speaker Hardwick were withdrawing the legislature's appeal, but that Karcher desired to continue the appeal. App. to Motion to Dismiss or Affirm 1a–3a. Appellees moved to dismiss the appeal on the ground that the legislature's withdrawal left the Court without a case or controversy. We postponed consideration of

the jurisdictional question to the hearing of the case on the merits. 479 U. S. 1062 (1987). We now dismiss the appeal for want of jurisdiction.

II

The power of federal courts to hear and decide cases is defined by Article III of the Constitution and by the federal statutes enacted thereunder. Karcher and Orechio seek to invoke this Court's jurisdiction under 28 U. S. C. § 1254(2). That statute empowers us to review cases upon "appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States." One who is not an original party to a lawsuit may of course become a party by intervention, substitution, or third-party practice. 9 J. Moore, B. Ward, & J. Lucas, Moore's Federal Practice ¶ 203.06 pp. 3–20 (1987). But we have consistently applied the general rule that one who is not a party or has not been treated as a party to a judgment has no right to appeal therefrom. *United States ex rel. Louisiana* v. *Jack*, 244 U. S. 397, 402 (1917); *Ex parte Leaf Tobacco Board of Trade*, 222 U. S. 578, 581 (1911); *Ex parte Cockcroft*, 104 U. S. 578, 579 (1882); *Ex parte Cutting*, 94 U. S. 14, 20–21 (1877).

Karcher and Orechio intervened in this lawsuit in their official capacities as presiding officers on behalf of the New Jersey Legislature. They do not appeal the judgment in those capacities. Indeed, they could not, for they no longer hold those offices. The authority to pursue the lawsuit on behalf of the legislature belongs to those who succeeded Karcher and Orechio in office. *Davis* v. *Preston*, 280 U. S. 406, 407 (1930). Federal Rule of Appellate Procedure 43(c)(1) provides that "[w]hen a public officer is a party to an appeal or other proceeding in the court of appeals in an official capacity and during its pendency . . . ceases to hold office, the action does not abate and the public officer's successor is automatically substituted as a party." The current presiding officers

have informed us that the New Jersey Legislature is not an appellant in this case.

Having lost their official status as presiding legislative officers, Karcher and Orechio now seek to appeal in their capacities as individual legislators and as representatives of the majority of the 200th New Jersey Legislature, the now-expired legislative body that enacted the minute of silence statute. They do not seek leave to intervene in those capacities. Rather, they assert, for the first time in their briefs to this Court, that they originally intervened and ligitated the lawsuit in those roles.

The fact that Karcher and Orechio participated in this litigation in their official capacities as presiding officers on behalf of the legislature does not mean that they became parties in all of their personal and professional capacities. In *Bender* v. *Williamsport Area School District*, 475 U. S. 534 (1986), we observed that "[a]cts performed by the same person in two different capacities 'are generally treated as the transactions of two different legal personages.'" *Id.*, at 543, n. 6, quoting F. James & G. Hazard, Civil Procedure § 11.6, p. 594 (3d ed. 1985). The concept of "legal personage" is a practical means of identifying the real interests at stake in a lawsuit. We have repeatedly recognized that the real party in interest in an official-capacity suit is the entity represented and not the individual officeholder. See *Bender*, *supra*, at 543–544; *Kentucky* v. *Graham*, 473 U. S. 159, 166 (1985); *Brandon* v. *Holt*, 469 U. S. 464, 471 (1985). We therefore agree with the Solicitor General's view that Karcher and Orechio's intervention as presiding legislative officers does not entitle them to appeal in their other individual and professional capacities. Brief for United States as *Amicus Curiae* 10–11. Karcher and Orechio may not appeal the Court of Appeals' judgment as individual legislators or as representatives of the 200th Legislature unless the record shows that they participated in those capacities below.

The course of proceedings in this case from the District Court to this Court make it clear that the only party-intervenor in this case was the incumbent New Jersey Legislature. At the District Court hearing on their oral motion to intervene, Karcher and Orechio represented to both the court and their opponents that they were intervening on behalf of the legislature and not as individual legislators.[1] The District Court permitted Karcher and Orechio to intervene as party-

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[1] "[INTERVENORS' COUNSEL]: I am Lawrence Marinari for the General Assembly and Senate, the intervenors.

"THE COURT: Who are you actually appearing for now?

"[INTERVENORS' COUNSEL]: I am appearing for both the presiding officers of the House and New Jersey Senate and New Jersey General Assembly.

. . . . .

"As the presiding officers of both houses, they are empowered by the rules of both houses to represent the House in ligitation.

"THE COURT: They are in a representative capacity?

"[INTERVENORS' COUNSEL]: That is correct.

. . . . .

"[PLAINTIFFS' COUNSEL]: I don't thin[k] Messrs. Karcher and Orrechio *[sic]* are proper parties. I think it is the Legislature as a whole, separate entities.

"[INTERVENORS' COUNSEL]: The institution is coming in as an institution. I can't come in for each of the 120 individuals directly. I have not polled each one of them.

. . . . .

"THE COURT: So I will grant the motion for intervention for Mr. Karcher and Mr. Orrechio *[sic]* in their capacities as Speakers of the respective Houses.

. . . . .

"[PLAINTIFFS' COUNSEL]: I do think the General Assembly and Senate are proper parties and can be represented by Orrechio *[sic]* and Karcher, but those entities—

"[INTERVENORS' COUNSEL]: That is who I am representing. The order says Alan J. Karcher in representative capacity as Speaker of the New Jersey General Assembly, the New Jersey General Assembly and the same for the Senate and its body." App. to Motion to Dismiss or Affirm 12a–21a.

defendants only in their representative capacities as presiding legislative officers. The intervention order provided:

> "Alan J. Karcher in his representative capacity as Speaker of the New Jersey General Assembly; the New Jersey General Assembly; Carmen A. Orechio in his representative capacity as President of the New Jersey Senate; and the New Jersey Senate; be permitted to intervene as direct party defendants." App. 53–54.

The District Court's opinion on the merits identifies the defendant-intervenors as "the New Jersey Assembly and New Jersey Senate." *May* v. *Cooperman*, 572 F. Supp., at 1563. In its separate opinion on attorney's fees, the District Court emphasizes that it gave the legislature leave to intervene to represent the interests of the State:

> "The Legislature itself, through the Speaker of the General Assembly and the President of the Senate, moved to intervene in the case. The Legislature was permitted to intervene because it was responsible for enacting the statute and because no other party defendant was willing to defend the statute. The Legislature sought to perform a task which normally falls to the executive branch, but which, in this case, the executive branch refused to perform." Record, Doc. No. 60, p. 20.

The record in the Court of Appeals similarly identifies the appellant-intervenor as the New Jersey Legislature. The notice of appeal was filed by "Alan J. Karcher, as Speaker of the New Jersey General Assembly; the New Jersey General Assembly; Carmen A. Orechio as President of the New Jersey Senate and the New Jersey Senate, Defendants-Intervenors." Record, Doc. No. 64. The Court of Appeals' opinion identifies the appellants as "the New Jersey Senate and Assembly." 780 F. 2d, at 241.

The notice of appeal to this Court identifies the appellants as "Alan J. Karcher, as Speaker of the New Jersey General Assembly; the New Jersey General Assembly; Carmen A.

Orechio, as President of the New Jersey Senate and the New Jersey Senate." App. to Juris. Statement 106a–107a. Even the jurisdictional statement refers to the appellants as "the Legislature." Juris. Statement 5–6. Though appellants assert in their brief that Karcher and Orechio as individual legislators were proper parties in the District Court and the Court of Appeals, our review of the record satisfies us that Karcher and Orechio have neither formally sought, nor in any sense been granted, permission to participate in this lawsuit as individual legislators.

We think it is also clear from the record that the party-intervenor at each point in the proceedings below was the incumbent legislature, on behalf of the State, and not the particular legislative body that enacted the minute of silence law. Nowhere in the record did Karcher and Orechio assert that they represented the 200th Legislature and no other.

In sum, Karcher and Orechio participated in this lawsuit in their official capacities as presiding officers of the New Jersey Legislature, but since they no longer hold those offices, they lack authority to pursue this appeal on behalf of the legislature. Karcher and Orechio as individual legislators and as representatives of the 200th New Jersey Legislature are not "parties" entitled to appeal the Court of Appeals' judgment under 28 U. S. C. § 1254(2). Accordingly, we must dismiss their appeal for want of jurisdiction.

III

Karcher and Orechio argue that if we dismiss their appeal we must vacate the judgments below. They advance two theories in support of this result.

First they contend that the judgments below must be vacated because no proper party-defendant ever intervened in the case. This is so, they say, because New Jersey law does not authorize the presiding legislative officers to represent the New Jersey Legislature in litigation. Not only is this claim directly contrary to appellants' explicit representations

to the District Court,[2] it appears to be wrong as a matter of New Jersey law. The New Jersey Supreme Court has granted applications of the Speaker of the General Assembly and the President of the Senate to intervene as parties-respondent on behalf of the legislature in defense of a legislative enactment. *In re Forsythe*, 91 N. J. 141, 144, 450 A. 2d 499, 500 (1982). Since the New Jersey Legislature had authority under state law to represent the State's interests in both the District Court and the Court of Appeals, we need not vacate the judgments below for lack of a proper defendant-appellant.

Appellants' second theory for vacating the judgments below is based upon our practice of vacating lower court judgments when a case becomes moot on appeal. See *Burke* v. *Barnes*, 479 U. S. 361, 365 (1987); *United States Department of Treasury* v. *Galioto*, 477 U. S. 556, 560 (1986); *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39 (1950). In *United States* v. *Munsingwear*, we explained that when a case becomes moot in its journey through the federal courts we will reverse or vacate the "unreviewable" judgment below and remand with directions to dismiss. We reasoned that this procedure "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *Id.*, at 40. Karcher and Orechio contend that the rationale underlying the *Munsingwear* procedure applies to this case, for it is the happenstance of their loss of official status that renders the judgment unreviewable.

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[2] "THE COURT: You say there is a rule which provides the Speaker of each House—

"[INTERVENORS' COUNSEL]: It is the presiding officer of each House and in charge of all administrative duties, and from that we have been in numerous suits and have cooperated with counsel anytime they want a deposition. I don't envision this to be a problem, your Honor." App. to Motion to Dismiss or Affirm 16a–17a.

We reject this argument because its underlying premise is wrong. This case did not become unreviewable when Karcher and Orechio left office. Rather, under Federal Rule of Appellate Procedure 43(c)(1), the authority of Karcher and Orechio to pursue the appeal on behalf of the legislature passed to their successors in office. The rules effectuating automatic substitution of public officers were specifically designed to prevent suits involving public officers from becoming moot due to personnel changes. See Advisory Committee Notes on 1961 Amdt. to Fed. Rule Civ. Proc. 25(d)(1), 28 U. S. C., pp. 568–569.

This controversy did not become moot due to circumstances unattributable to any of the parties. The controversy ended when the losing party—the New Jersey Legislature—declined to pursue its appeal. Accordingly, the *Munsingwear* procedure is inapplicable to this case. Because Karcher and Orechio are not parties to this case in the capacities under which they seek to appeal, their appeal must be dismissed for want of jurisdiction.

It is so ordered.

JUSTICE WHITE, concurring in the judgment.

I do not disagree with the Court that Mr. Karcher and Mr. Orechio were made parties to this suit in their official capacities representing the New Jersey General Assembly and the New Jersey Senate; those two entities were also made parties. Neither official intervened in his individual capacity as a legislator, and neither sought to appear in that capacity in the Court of Appeals. In January 1986, after the Court of Appeals had decided the case but before any attempt was made to bring it here on appeal, Karcher and Orechio lost their official standing to represent the New Jersey Legislature. It is clear enough to me that they therefore lost their authority to appeal on behalf of the legislature and that their successors in office automatically became parties in their stead, pursuant to Federal Rule of Appellate Procedure 43(c)(1). If any appeal was to be had on behalf of the legislature

as it then existed, the appeal was to be taken by the substituted parties, not by Karcher and Orechio. This would be the case even if under New Jersey law, legislative action would be required to authorize the successor officials to drop the appeal. The fact is that there never was a cognizable appeal by the incumbent New Jersey Legislature; an appeal on its behalf never reached this Court. Since Karcher and Orechio did not appeal the Court of Appeals' judgment in their capacity as individual legislators, or as representatives of the defunct 200th New Jersey Legislature, I do not reach the question whether they would have had standing to maintain this appeal in one of those other capacities.

Last June, we denied a motion by parents and a schoolteacher to intervene as appellants in this Court. 483 U. S. 1017. Since our interest in this case was the validity of the moment-of-silence statute, it might appear that we could save this case and avoid wasting the time and attention we have given it by vacating our prior order, and granting the motion to intervene, which was filed by those seemingly with standing to defend the law. Cf. *Mullaney* v. *Anderson*, 342 U. S. 415 (1952). But if in reality we had no jurisdiction to entertain the appeal taken in this case, it is evident that the movants' efforts to enter the case came too late.

It bears pointing out, however, that we have now acknowledged that the New Jersey Legislature and its authorized representative have the authority to defend the constitutionality of a statute attacked in federal court. Cf. *Immigration and Naturalization Service* v. *Chadha*, 462 U. S. 919, 940 (1983). Otherwise, there would never have been a valid appeal to the Court of Appeals, in which event, we would not leave standing the judgment of that court, as we now do.

It is also clear that because Karcher and Orechio did not seek to intervene as individual legislators in a nonrepresentative capacity, we again leave for another day the issue whether individual legislators have standing to intervene and

defend legislation for which they voted. See *Burke* v. *Barnes*, 479 U. S. 361 (1987).

Since I agree with the majority that no proper appeal was taken from the judgment below, I concur in its judgment that the "appeal" before us should be dismissed for want of jurisdiction.

LANGLEY ET UX. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 86–489. Argued October 14, 1987—Decided December 1, 1987

To finance the purchase of land in Louisiana, petitioners borrowed money from a bank insured by the Federal Deposit Insurance Corporation (FDIC) and, in consideration for the loan, executed a note, a collateral mortgage, and personal guarantees. When petitioners failed to pay an installment due on a renewal of the note, the bank filed suit for principal and interest in a Louisiana court, which suit was removed on diversity grounds to Federal District Court. Petitioners alleged, as a defense against the bank's claim, that the land purchase and their note had been procured by the bank's misrepresentations overstating the amount of land and mineral acres in the tract, and falsely stating that there were no outstanding mineral leases on the property. No references to the alleged representations appeared in the documents executed by petitioners, in the bank's records, or in the minutes of the bank's board of directors or loan committee. While the suit was pending, a Louisiana official closed the bank because of its unsound condition and appointed the FDIC as receiver. The FDIC ultimately acquired petitioners' note and was substituted as a plaintiff in this lawsuit. The District Court granted summary judgment for the FDIC, and the Court of Appeals affirmed, holding that the word "agreement" in a provision of the Federal Deposit Insurance Act of 1950, 12 U. S. C. § 1823(e), encompassed the kinds of material terms or warranties asserted by petitioners in their misrepresentation defense and, because § 1823(e)'s requirements were not met, the defense was barred. Section 1823(e) provides that no "agreement" tending to diminish or defeat the FDIC's "right, title or interest" in any asset acquired by the FDIC under the section shall be valid against the FDIC unless it shall have been (1) in writing, (2) executed contemporaneously with the bank's acquisition of the asset, (3) approved by the bank's board of directors or loan committee and reflected in the minutes of the board or committee, and (4) continuously, from the time of its execution, an official record of the bank.

Held: A condition to payment of a note, including the truth of an express warranty, is part of the "agreement" to which the requirements of § 1823(e) attach. Because the representations alleged by petitioners

constituted such a condition and did not meet the statute's requirements, they cannot be asserted as a defense here. Pp. 90–96.

(a) The word "agreement" in § 1823(e) is not limited to an express promise to perform an act in the future. The essence of petitioners' defense is that the bank made certain warranties regarding the land, the truth of which was a condition to performance of their obligation to repay the loan. As used in commercial and contract law, the term "agreement" often has a wider meaning than a promise, and embraces such a condition upon performance. This common meaning of the word "agreement" must be assigned to its usage in § 1823(e) if that section is to fulfill its intended purposes of allowing federal and state bank examiners to rely on a bank's records in evaluating the bank's assets, ensuring mature consideration of unusual loan transactions by senior bank officials, and preventing fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure. Cf. *D'Oench, Duhme & Co.* v. *FDIC*, 315 U. S. 447. Pp. 90–93.

(b) There is no merit to petitioners' argument that even if a misrepresentation concerning an existing fact can sometimes constitute an agreement covered by § 1823(e), it at least does not do so when the misrepresentation was fraudulent and the FDIC had knowledge of the asserted defense when it acquired the note. Neither fraud in the inducement nor the FDIC's knowledge thereof is relevant to the section's application. No conceivable reading of the word "agreement" in § 1823(e) could cause it to cover a representation or warranty that is bona fide but to exclude one that is fraudulent. The bank's alleged misrepresentations here did not constitute fraud in the factum, which would render the note void and take it out of § 1823(e), but instead constituted only fraud in the inducement, which rendered the note voidable but not void. The bank therefore had and could transfer to the FDIC voidable title, which was enough to constitute "title or interest" in the note for the purpose of § 1823(e). Even if this Court had the power to engraft an equitable exception upon the statute's plain terms, the equities petitioners invoke are not the equities the statute regards as predominant. Pp. 93–96.

792 F. 2d 541, affirmed.

SCALIA, J., delivered the opinion for a unanimous Court.

William C. Shockey argued the cause and filed a brief for petitioners.

Richard G. Taranto argued the cause for respondent. With him on the brief were *Solicitor General Fried, Deputy*

Solictor General Wallace, John C. Murphy, Jr., and *Ann S. DuRoss*.

JUSTICE SCALIA delivered the opinion of the Court.

Petitioners W. T. and Maryanne Grimes Langley seek reversal of a decision by the United States Court of Appeals for the Fifth Circuit granting the Federal Deposit Insurance Corporation (FDIC) summary judgment on its claim for payment of a promissory note signed by petitioners. 792 F. 2d 541 (1986). The Fifth Circuit rejected petitioners' contention that a defense of misrepresentation of existing facts is not barred by 12 U. S. C. § 1823(e) because such a representation is not an "agreement" under that section. We granted certiorari to resolve a conflict in the Courts of Appeals. 479 U. S. 1028 (1987). Compare *Gunter* v. *Hutcheson*, 674 F. 2d 862, 867 (CA11), cert. denied, 459 U. S. 826 (1982); *FDIC* v. *Hatmaker*, 756 F. 2d 34, 37 (CA6 1985) (dictum).

I

The Langleys purchased land in Pointe Coupee Parish, Louisiana, in 1980. To finance the purchase, they borrowed $450,000 from Planters Trust & Savings Bank of Opelousas, Louisiana, a bank insured by the FDIC. In consideration for the loan, they executed a note, a collateral mortgage, and personal guarantees. The note was renewed several times, the last renewal being in March 1982, for the principal amount of $468,124.41.

In October 1983, after the Langleys had failed to pay the first installment due on the last renewal of the note, Planters brought the present suit for principal and interest in a Louisiana state trial court. The Langleys removed the suit, on grounds of diversity, to the United States District Court for the Middle District of Louisiana, where it was consolidated with a suit by the Langleys seeking more than $5 million in damages from Planters and others. The Langleys alleged as one of the grounds of complaint in their own suit, and as a defense against Planters' claim in the present suit, that the

1980 land purchase and the notes had been procured by misrepresentations. In particular, they alleged that the notes had been procured by the bank's misrepresentations that the property conveyed in the land purchase consisted of 1,628.4 acres, when in fact it consisted of only 1,522, that the property included 400 mineral acres, when in fact it contained only 75, and that there were no outstanding mineral leases on the property, when in fact there were.[1] No reference to these representations appears in the documents executed by the Langleys, in the bank's records, or in the minutes of the bank's board of directors or loan committee.

In April 1984, the FDIC conducted an examination of Planters during which it learned of the substance of the lawsuits with the Langleys, including the allegations of Planters' misrepresentations. On May 18, 1984, the Commissioner of Financial Institutions for the State of Louisiana closed Planters because of its unsound condition and appointed the FDIC as receiver. The FDIC thereupon undertook the financing of a purchase and assumption transaction pursuant to 12 U. S. C. § 1823(c)(2), in which all the deposit liabilities and most of the assets of Planters were assumed by another FDIC-insured bank in the community. Because the amount of the liabilities greatly exceeded the value of the assets, the FDIC paid the assuming bank $36,992,000, in consideration for which the FDIC received, *inter alia*, the Langleys' March 1982 note.

In October 1984, the FDIC was substituted as a plaintiff in this lawsuit, and moved for summary judgment on its claim. The District Court granted the motion, 615 F. Supp. 749

[1] The Langleys also alleged certain other misrepresentations by Planters, including that the Langleys would have no personal liability on the notes, that Planters would provide another purchaser for the land as soon as the sale to the Langleys was closed, and that no payments would be due until the property was resold. The Langleys concede that 12 U. S. C. § 1823(e) bars these other misrepresentations from being asserted as defenses to FDIC's suit on the note because they were promissory in nature. Brief for Petitioners 12.

(WD La. 1985), and was sustained on appeal. The Fifth Circuit held that the word "agreement" in 12 U. S. C. § 1823(e) encompassed the kinds of material terms or warranties asserted by the Langleys in their misrepresentation defenses and, because the requirements of § 1823(e) were not met, those defenses were barred. 792 F. 2d, at 545–546. We granted the Langleys' petition for certiorari on the issue whether, in an action brought by the FDIC in its corporate capacity for payment of a note, § 1823(e) bars the defense that the note was procured by fraud in the inducement even when the fraud did not take the form of an express promise.

II

The Federal Deposit Insurance Act of 1950, § 13(e), 64 Stat. 889, as amended, 12 U. S. C. § 1823(e), provides:

> "No agreement which tends to diminish or defeat the right, title or interest of the Corporation [FDIC] in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank."

A

Petitioners' principal contention is that the word "agreement" in the foregoing provision encompasses only an express promise to perform an act in the future. We do not agree.

As a matter of contractual analysis, the essence of petitioners' defense against the note is that the bank made cer-

tain warranties regarding the land, the truthfulness of which was a condition to performance of their obligation to repay the loan. See 1 A. Corbin, Contracts § 14, p. 31 (1963) ("[T]ruth [of the warranty] is a condition precedent to the duty of the other party"); accord, 5 S. Williston, Contracts § 673, pp. 168–171 (3d ed. 1961); J. Murray, Contracts § 136, pp. 275–276 (2d rev. ed. 1974). As used in commercial and contract law, the term "agreement" often has "a wider meaning than . . . promise," Restatement (Second) of Contracts § 3, Comment *a* (1981), and embraces such a condition upon performance. The Uniform Commercial Code, for example, defines agreement as "the bargain of the parties in fact as found in their language or by implication from other circumstances . . . ." U. C. C. § 1–201(3), 1 U. L. A. 44 (1976). Quite obviously, the parties' bargain cannot be reflected without including the conditions upon their performance, one of the two principal elements of which contracts are constructed. Cf. E. Farnsworth, Contracts § 8.2, p. 537 (1982) ("[P]romises, which impose duties, and conditions, which make duties conditional, are the main components of agreements"). It seems to us that this common meaning of the word "agreement" must be assigned to its usage in § 1823(e) if that section is to fulfill its intended purposes.

One purpose of § 1823(e) is to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets. Such evaluations are necessary when a bank is examined for fiscal soundness by state or federal authorities, see 12 U. S. C. §§ 1817(a)(2), 1820(b), and when the FDIC is deciding whether to liquidate a failed bank, see § 1821(d), or to provide financing for purchase of its assets (and assumption of its liabilities) by another bank, see §§ 1823(c)(2), (c)(4)(A). The last kind of evaluation, in particular, must be made "with great speed, usually overnight, in order to preserve the going concern value of the failed bank and avoid an interruption in banking services." *Gunter* v. *Hutcheson*, 674 F. 2d, at 865. Neither the FDIC nor

state banking authorities would be able to make reliable evaluations if bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions.

A second purpose of § 1823(e) is implicit in its requirement that the "agreement" not merely be on file in the bank's records at the time of an examination, but also have been executed and become a bank record "contemporaneously" with the making of the note and have been approved by officially recorded action of the bank's board or loan committee. These latter requirements ensure mature consideration of unusual loan transactions by senior bank officials, and prevent fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure. Neither purpose can be adequately fulfilled if an element of a loan agreement so fundamental as a condition upon the obligation to repay is excluded from the meaning of "agreement."

That "agreement" in § 1823(e) covers more than promises to perform acts in the future is confirmed by examination of the leading case in this area prior to enactment of § 1823(e) in 1950. In *D'Oench, Duhme & Co.* v. *FDIC*, 315 U. S. 447 (1942), the FDIC acquired a note in a purchase and assumption transaction. The maker asserted a defense of failure of consideration (that is, the failure to perform a promise that was a condition precedent to the maker's performance), based on an undisclosed agreement between it and the failed bank that the note would not be called for payment. The Court held that this "secret agreement" could not be a defense to suit by the FDIC because it would tend to deceive the banking authorities. *Id.*, at 460. The Court stated that when the maker "lent himself to a *scheme or arrangement* whereby the banking authority . . . was likely to be misled," that scheme or arrangement could not be the basis for a defense against the FDIC. *Ibid.* (emphasis added). We can safely assume that Congress did not mean "agreement" in § 1823(e) to be interpreted so much more narrowly than its

permissible meaning as to disserve the principle of the leading case applying that term to FDIC-acquired notes. Certainly, one who signs a facially unqualified note subject to an unwritten and unrecorded condition upon its repayment has lent himself to a scheme or arrangement that is likely to mislead the banking authorities, whether the condition consists of performance of a counterpromise (as in *D'Oench, Duhme*) or of the truthfulness of a warranted fact.

B

Petitioners' fallback position is that even if a misrepresentation concerning an existing fact can sometimes constitute an agreement covered by § 1823(e), it at least does not do so when the misrepresentation was fraudulent and the FDIC had knowledge of the asserted defense at the time it acquired the note. We conclude, however, that neither fraud in the inducement nor knowledge by the FDIC is relevant to the section's application.

No conceivable reading of the word "agreement" in § 1823(e) could cause it to cover a representation or warranty that is bona fide but to exclude one that is fraudulent. Petitioners effectively acknowledge this when they concede that the fraudulent nature of a *promise* would not cause it to lose its status as an "agreement." See *supra*, at 89, n. 1. The presence of fraud could be relevant, however, to another requirement of § 1823(e), namely, the requirement that the agreement in question "ten[d] to diminish or defeat the right, title or interest" of the FDIC in the asset.

Respondent conceded at oral argument that the real defense of fraud in the factum—that is, the sort of fraud that procures a party's signature to an instrument without knowledge of its true nature or contents, see U. C. C. § 3–305(2)(c), Comment 7, 2 U. L. A. 241 (1977)—would take the instrument out of § 1823(e), because it would render the instrument entirely void, see Restatement (Second) of Contracts § 163 and Comments *a*, *c*; Farnsworth § 4.10, at 235, thus leaving

no "right, title or interest" that could be "diminish[ed] or defeat[ed]." See Tr. of Oral Arg. 24–25, 27–30. Petitioners have never contended, however, nor could they have successfully, that the alleged misrepresentations about acreage or mineral interests constituted fraud in the factum. It is clear that they would constitute only fraud in the inducement, which renders the note voidable but not void. See U. C. C. §3–201(1), 2 U. L. A. 127; Restatement (Second) of Contracts §163, Comment *c;* Farnsworth §4.10, at 235–236. The bank therefore had and could transfer to the FDIC voidable title, which is enough to constitute "title *or* interest" in the note. This conclusion is not only textually compelled, but produces the only result in accord with the purposes of the statute. If voidable title were not an "interest" under §1823(e), the FDIC would be subject not only to undisclosed fraud defenses but also to a wide range of other undisclosed defenses that make a contract voidable, such as certain kinds of mistakes and innocent but material misrepresentations. See Restatement (Second) of Contracts §§152–153, 164.

Finally, knowledge of the misrepresentation by the FDIC prior to its acquisition of the note is not relevant to whether §1823(e) applies. Nothing in the text would support the suggestion that it is: An agreement is an agreement whether or not the FDIC knows of it; and a voidable interest is transferable whether or not the transferee knows of the misrepresentation or fraud that produces the voidability. See Farnsworth §11.8, at 780–781; cf. U. C. C. §3–201(1), 2 U. L. A. 127. Petitioners are really urging us to engraft an equitable exception upon the plain terms of the statute. Even if we had the power to do so, the equities petitioners invoke are not the equities the statute regards as predominant. While the borrower who has relied upon an erroneous or even fraudulent unrecorded representation has some claim to consideration, so do those who are harmed by his failure to protect himself by assuring that his agreement is approved and recorded in accordance with the statute. Harm to the

FDIC (and those who rely upon the solvency of its fund) is not avoided by knowledge at the time of acquiring the note. The FDIC is an insurer of the bank, and is liable for the depositors' insured losses whether or not it decides to acquire the note. Cf. 12 U. S. C. § 1821(f). The harm to the FDIC caused by the failure to record occurs no later than the time at which it conducts its first bank examination that is unable to detect the unrecorded agreement and to prompt the invocation of available protective measures, including termination of the bank's deposit insurance. See § 1818 (1982 ed. and Supp. IV). Thus, insofar as the recording provision is concerned, the state of the FDIC's knowledge at that time is what is crucial. But as we discussed earlier, see *supra*, at 92, § 1823(e) is meant to ensure more than just the FDIC's ability to rely on bank records at the time of an examination or acquisition. The statutory requirements that an agreement be approved by the bank's board or loan committee and filed contemporaneously in the bank's records assure prudent consideration of the loan before it is made, and protect against collusive reconstruction of loan terms by bank officials and borrowers (whose interests may well coincide when a bank is about to fail). Knowledge by the FDIC could substitute for the latter protection only if it existed at the very moment the agreement was concluded, and could substitute for the former assurance not at all.

The short of the matter is that Congress opted for the certainty of the requirements set forth in § 1823(e). An agreement that meets them prevails even if the FDIC did not know of it; and an agreement that does not meet them fails even if the FDIC knew. It would be rewriting the statute to hold otherwise. Such a categorical recording scheme is of course not unusual. Under Article 9 of the U. C. C., for example, a filing secured creditor prevails even over those unrecorded security interests of which he was aware. See, *e. g.*, *Rockwell Int'l Credit Corp.* v. *Valley Bank*, 109 Idaho 406, 408–409, 707 P. 2d 517, 519–520 (Ct. App. 1985); *Bloom*

v. *Hilty*, 427 Pa. 463, 471, 234 A. 2d 860, 863–864 (1967); 9 R. Anderson, Uniform Commercial Code § 9–312:74, p. 298 (3d ed. 1985); J. White & R. Summers, Uniform Commercial Code § 25–4, p. 1037 (2d ed. 1980).

* * *

A condition to payment of a note, including the truth of an express warranty, is part of the "agreement" to which the writing, approval, and filing requirements of 12 U. S. C. § 1823(e) attach. Because the representations alleged by petitioners constitute such a condition and did not meet the requirements of the statute, they cannot be asserted as defenses here. The judgment of the Court of Appeals is

Affirmed.

Syllabus

OMNI CAPITAL INTERNATIONAL, LTD., ET AL. *v.* RUDOLF WOLFF & CO., LTD., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 86–740. Argued October 6, 1987—Decided December 8, 1987

Omni Capital International, Ltd., and Omni Capital Corporation (hereafter petitioners), New York corporations, marketed an investment program involving commodity-futures trades on the London Metals Exchange. Certain investors filed suits (later consolidated) against petitioners in the Federal District Court for the Eastern District of Louisiana, charging that petitioners fraudulently induced them to participate in petitioners' program, in violation of various federal securities laws. Petitioners impleaded respondent Rudolf Wolff & Co., a British corporation with offices in London that was employed by petitioners to handle trades on the London Exchange, and respondent Gourlay (hereafter respondents), a United Kingdom citizen and resident who was Wolff's representative in soliciting petitioners' business. Petitioners contended that their liability, if any, was caused by respondents' improper trading activities. While the action was pending, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, was decided, recognizing an implied private cause of action under the Commodity Exchange Act (CEA), and the plaintiffs in this litigation amended their complaints to allege violations of that Act. The District Court dismissed the other securities law claims as pre-empted by the CEA, and held that it lacked personal jurisdiction over respondents because (1) the CEA was silent about service of process for private causes of action, (2) thus, application of Louisiana's long-arm statute was required, and (3) that statute's requirements were not met. The Court of Appeals affirmed.

Held: The District Court lacked personal jurisdiction over respondents in this federal-question litigation under the CEA. Pp. 102–111.

(a) The requirement that a federal court have personal jurisdiction flows from the Due Process Clause of the Fifth Amendment. However, before a federal court may exercise personal jurisdiction over a defendant, there must be more than notice to the defendant and a constitutionally sufficient relationship between the defendant and the forum. There also must be a basis for the defendant's amenability to service of summons. Absent consent, there must be authorization for service of summons on the defendant. Pp. 103–104.

(b) Under Federal Rule of Civil Procedure 4(e), a federal court normally looks either to a federal statute or to the long-arm statute of the State in which it sits to determine whether an out-of-state defendant is amenable to service. After the *Curran* decision, and while the present litigation was still pending in the District Court, Congress added § 22 to the CEA, explicitly authorizing a private cause of action for CEA violations but not referring to service of process, in contrast to Congress' explicit authorization of nationwide service of process in other CEA provisions for other civil actions under the Act. This contrast, as well as the legislative history, supports the conclusion that Congress did not intend to provide nationwide service of process for private actions under the CEA. Nor was nationwide service implicitly authorized for any implied private cause of action under the CEA, such as petitioners', that accrued prior to § 22's effective date. Moreover, the District Court held, and petitioners concede, that the requirements of Louisiana's long-arm statute were not met here. Pp. 104–108.

(c) Even were it within this Court's power, judicial creation of a common-law rule authorizing service of process in this litigation would be unwise. The strength of the longstanding assumption that federal courts cannot add to the scope of service of summons Congress has authorized, and the network of statutory enactments and judicial decisions tied to that assumption, argue strongly against devising common-law service of process provisions. The responsibility for creating service of process provisions rests with those who propose the Federal Rules of Civil Procedure and with Congress. Pp. 108–111.

795 F. 2d 415, affirmed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Robert A. Kutcher argued the cause for petitioners. With him on the brief was *John D. Fricke*. *Anita M. Warner* filed a brief for Point Landing, Inc., et al., respondents under this Court's Rule 19.6, in support of petitioners.

Elliot Paskoff argued the cause for respondents and filed a brief for respondent Rudolf Wolff & Co., Ltd. *Sheldon H. Elsen*, *Clement J. Colucci*, *Jerome Lipper*, and *Michael S. Fawer* filed a brief for respondent Gourlay.

JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents questions concerning the prerequisites to a federal court's exercise of *in personam* jurisdiction.

I

Petitioners Omni Capital International, Ltd., and Omni Capital Corporation (collectively Omni),[1] New York corporations, marketed an investment program involving commodity-futures trades on the London Metals Exchange. Omni employed respondent Rudolf Wolff & Co., Ltd., a British corporation with its offices in London, as a broker to handle trades on that Exchange. Respondent James Gourlay, a citizen and resident of the United Kingdom, served as Wolff's representative in soliciting this business from Omni.

The United States Internal Revenue Service disallowed income tax deductions, claimed by the participants in Omni's investment program, and did so on the ground that the program's commodities trades on the London Metals Exchange were not bona fide arm's-length transactions. A number of corporate and individual investors who participated in Omni's program then sued Omni in four separate actions in the United States District Court for the Eastern District of Louisiana.[2] The plaintiffs in each action charged that, by misrepresenting its tax benefits and future profits, Omni fraudulently induced them to participate in the investment program. Omni, in turn, impleaded Wolff and Gourlay,[3]

[1] The other petitioners are Richard Friedberg and Michael Stern, officers of Omni, and Northglen Capital Corporation which was named as a defendant with Omni in three of the four consolidated cases now before this Court. Petitioners have filed a single brief.

[2] The plaintiffs were two Louisiana corporations, Point Landing, Inc., and Point Landing Fuel Corporation, and six individuals, William S. and Ruby M. Smith, Frank J. and Brenda A. George, and Dennis M. and Joan Rosenberg. Although all these plaintiffs technically are respondents here, see this Court's Rule 19.6, all of them except the Georges have filed a skeletal brief adopting Omni's brief "as if copied *in extenso*." Brief for Respondents in Support of Petitioners 1.

[3] In the Point Landing suit, Wolff was named as a defendant. In that suit, Omni cross-claimed against Wolff and filed a third-party complaint against Gourlay. In the Smith and George suits, Omni filed a third-party complaint against both Wolff and Gourlay. In the Rosenberg suit, no move was made against either Wolff or Gourlay.

contending that its liability, if any, was caused by their improper trading activities.

The procedural history is complex. The original complaints, filed in 1980 and 1981, charged violations of the Securities Exchange Act of 1934, ch. 404, 48 Stat. 881, as amended, 15 U. S. C. § 78a *et seq.* (1982 ed. and Supp. IV); SEC Rule 10b–5, 17 CFR § 240.10b–5 (1987); and the Securities Act of 1933, 48 Stat. 74, as amended, 15 U. S. C. § 77a *et seq.* (1982 ed. and Supp. IV), and included pendent state-law claims. The four cases were consolidated in the District Court. While they were pending, this Court decided *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353 (1982). In *Curran*, we recognized an implied private cause of action under the Commodity Exchange Act (CEA), 42 Stat. 998, as amended, 7 U. S. C. § 1 *et seq.* (1982 ed. and Supp. IV). The plaintiffs accordingly amended their complaints to allege violations of §§ 4b and 9(b) of the CEA, as amended, 7 U. S. C. §§ 6b and 13(b).

Wolff and Gourlay moved to dismiss the claims against them for lack of personal jurisdiction, and, as an additional ground, argued that the securities law claims failed to state causes of action. In its initial opinion dated May 13, 1983, the District Court dismissed the securities law claims as having been pre-empted by the CEA but concluded that it could exercise personal jurisdiction over Wolff and Gourlay. App. 6. The court reasoned that, in actions under the CEA, "Congress intended for U. S. courts to exercise personal jurisdiction over foreign defendants not present in the United States to the limits of the due process clause of the Fifth Amendment." *Id.*, at 9. Therefore, the court determined, if "the quality and nature of a foreign defendant's activities . . . in the United States" support a "finding of fair play and substantial justice," personal jurisdiction would be proper. *Id.*, at 9–10. After examining the extent of Wolff's and Gourlay's contacts with the United States, the District Court concluded it had personal jurisdiction.

After this initial decision of the District Court, the Fifth Circuit decided *DeMelo* v. *Toche Marine, Inc.*, 711 F. 2d 1260 (1983). In *DeMelo*, the Court of Appeals concluded that "when a federal question case is based upon a federal statute that is silent as to service of process, and a state long-arm statute is therefore utilized to serve an out-of-state defendant, [Federal Rule of Civil Procedure] 4(e) requires that the state's standard of amenability to jurisdiction apply." *Id.*, at 1266. Following that decision by its controlling court, the District Court granted Wolff's and Gourlay's motions for reconsideration, noting that the CEA is silent about service of process for private causes of action. App. 19. Upon its reconsideration, the District Court concluded that, in accord with *DeMelo*, "unless jurisdiction can be asserted under the Louisiana long-arm statute, there is no personal jurisdiction over Wolff or Gourlay." App. 22. Because, in its view, the requirements of the Louisiana long-arm statute[4] were not met, the District Court concluded that it lacked personal jurisdiction over Wolff and Gourlay, and it directed the entry

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[4] Louisiana's long-arm statute, then in effect, provided in relevant part:

"A court may exercise personal jurisdiction over a nonresident, who acts directly or by an agent, as to a cause of action arising from the nonresident's

"(a) transacting any business in this state;

"(b) contracting to supply services or things in this state;

"(c) causing injury or damage by an offense or quasi offense committed through an act or omission in this state;

"(d) causing injury or damage in this state by an offense or quasi offense committed through an act or omission outside of this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state . . . ." La. Rev. Stat. Ann. § 13:3201 (West 1968).

Louisiana has amended this statute, see 1980 La. Acts, No. 764, § 2, and 1984 La. Acts, No. 398, § 1, codified at La. Rev. Stat. Ann. § 13:3201 (West Supp. 1987), but no party has argued that the amendments affect the outcome of this litigation. We therefore do not consider them.

of a final judgment dismissing all claims against them. *Id.*, at 23.

The Fifth Circuit decided the ensuing appeals en banc in the first instance and, by a 9-to-6 vote, affirmed. *Point Landing, Inc.* v. *Omni Capital Int'l, Ltd.*, 795 F. 2d 415 (1986). The majority started from "the unmalleable principle of law . . . that federal courts . . . must ground their personal jurisdiction on a federal statute or rule." *Id.*, at 423. In the majority's view, neither the CEA nor the Federal Rules of Civil Procedure authorized service of process upon Wolff or Gourlay, and therefore personal jurisdiction over them was lacking. The dissent conceded that neither the CEA nor Civil Rule 4 provided for service of process on Wolff and Gourlay but would have remedied this "bizarre hiatus in the Rules," 795 F. 2d, at 428, with an ad hoc authorization of service of process on them based on their contacts with the United States as a whole.

Because of a possible conflict with views of the Sixth Circuit expressed in *Handley* v. *Indiana & Michigan Electric Co.*, 732 F. 2d 1265, 1272 (1984), we granted certiorari to decide whether, in this federal-question litigation arising under the CEA, the District Court may exercise personal jurisdiction over Wolff and Gourlay.

II

Omni's primary and fundamental contention is that in a suit under the CEA, the only limits on a district court's power to exercise personal jurisdiction derive from the Due Process Clause of the Fifth Amendment. The objection of the Court of Appeals, and of Wolff and Gourlay before this Court, is that, even if an exercise of personal jurisdiction would comport with that Due Process Clause,[5] the District Court can-

[5] Under Omni's theory, a federal court could exercise personal jurisdiction, consistent with the Fifth Amendment, based on an aggregation of the defendant's contacts with the Nation as a whole, rather than on its contacts with the State in which the federal court sits. As was the case in *Asahi Metal Industry Co.* v. *Superior Court of Cal.*, 480 U. S. 102 (1987), "[w]e

not exercise personal jurisdiction over Wolff and Gourlay because they are not amenable to service of summons in the absence of a statute or rule authorizing such service.[6]

Omni attempts to meet this objection in a variety of ways. First, Omni argues that the District Court may exercise personal jurisdiction because Wolff and Gourlay have constitutionally sufficient contacts with the forum and, as well, have notice of the suits. Second, Omni contends that even if a rule authorizing service is a prerequisite to effective service and thus to the exercise of personal jurisdiction, Congress implicitly authorized nationwide service for private causes of action under the CEA. Third, Omni presses upon us the view of the Fifth Circuit dissenters that, even if authorization for service of process is required and cannot be found in a statute or rule, such authorization should be created by fashioning a remedy to fill a gap in the Federal Rules of Civil Procedure. We examine these contentions in turn.

III

A

Omni argues that the jurisdictional limits that Art. III of the Constitution places on the federal courts relate to subject-matter jurisdiction only. In this view, although Art. III, § 1, leaves it to Congress to "ordain and establish" inferior federal courts, the only limits on those courts, once established, in their exercise of personal jurisdiction, relate to due process. Thus, Omni contends, the District Court may exercise personal jurisdiction over Wolff and Gourlay if the Due Process Clause of the Fifth Amendment does not forbid it.

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have no occasion" to consider the constitutional issues raised by this theory. *Id.*, at 113, n.

[6] There is no objection to the method of service in this litigation; the objection is only to amenability to service. See *Point Landing, Inc.* v. *Omni Capital Int'l, Ltd.*, 795 F. 2d 415, 424 (CA5 1986).

Omni's argument that Art. III does not itself limit a court's personal jurisdiction is correct. "The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. . . . It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694, 702 (1982). Omni's argument fails, however, because there are other prerequisites to a federal court's exercise of personal jurisdiction.

Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied. "[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served." *Mississippi Publishing Corp.* v. *Murphree*, 326 U. S. 438, 444–445 (1946). Thus, before a court may exercise personal jurisdiction over a defendant, there must be more than notice to the defendant and a constitutionally sufficient relationship between the defendant and the forum. There also must be a basis for the defendant's amenability to service of summons. Absent consent, this means there must be authorization for service of summons on the defendant.

B

The next question, then, is whether there is authorization to serve summons in this litigation. Today, service of process in a federal action is covered generally by Rule 4 of the Federal Rules of Civil Procedure. Rule 4(f) describes where process "may be served."[7] It authorizes service in the State

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[7] Rule 4(f) provides:

"All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state."

in which the action is brought, or anywhere else authorized by a federal statute or by the Rules.

The "most obvious reference" of this last provision is to Rule 4(e).[8] See D. Currie, Federal Courts 373 (3d ed. 1982). The first sentence of the Rule speaks to the ability to serve summons on an out-of-state defendant when a federal statute authorizes such service. The second sentence, as an additional method, authorizes service of summons "under the circumstances" prescribed in a state statute or rule. Thus, under Rule 4(e), a federal court normally looks either to a federal statute or to the long-arm statute of the State in which it sits to determine whether a defendant is amenable to service, a prerequisite to its exercise of personal jurisdiction.[9]

Omni argues that Wolff and Gourlay are amenable to service under Rule 4(e) because the CEA implicitly "provides for service . . . upon a party not an inhabitant of or found within the state." Omni points out that, prior to this Court's recognition in *Curran* of an implied private cause of action, all other civil actions under the CEA explicitly authorized nationwide service of process. See § 6c (in a Commodity Futures Trading Commission (CFTC) action, service authorized "wherever the defendant may be found"), § 6d(4) (in an action

[8] Rule 4(e) provides:

"Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides . . . for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state . . . service may . . . be made under the circumstances and in the manner prescribed in the statute or rule."

[9] This assumes, of course, that the defendant is not "an inhabitant of or found within the state," Fed. Rule Civ. Proc. 4(e), and has not consented to service.

by a state attorney general, service authorized "wherever the defendant may be found"), and § 14(d) (in enforcement action by a beneficiary of a CFTC order, service authorized "anywhere in the United States") of the CEA, as amended, 7 U. S. C. §§ 13a–1, 13a–2(4), and 18(d). Omni contends that this broad avenue for service is mandated by the importance of futures trading to the Nation as a whole. Since this Court concluded that a private right of action was intended as a "tool for enforcement," *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S., at 393, it must be given the same "dignity" as other enforcement provisions. Accordingly, Omni contends, nationwide service of process is also authorized for the implied private cause of action under the CEA.

Neither the majority nor the dissent in the Court of Appeals found that the CEA contained an implied provision for nationwide service of process in a private cause of action. We, too, decline to draw that inference. After the *Curran* decision, while the present litigation was still pending in the District Court, Congress enacted the Futures Trading Act of 1982, 96 Stat. 2294. That Act amended the CEA by adding § 22, 96 Stat. 2322, 7 U. S. C. § 25, which authorizes explicitly a private right of action for a violation of the CEA. Section 22, however, is silent as to service of process. This contrasts sharply with the other enforcement provisions of the CEA, on which Omni asks us to rely. We find it significant that Congress expressly provided for nationwide service of process in those sections but did not do so in the new § 22. See *Russello* v. *United States*, 464 U. S. 16, 23 (1983). It would appear that Congress knows how to authorize nationwide service of process when it wants to provide for it. That Congress failed to do so here argues forcefully that such authorization was not its intention. Cf. *INS* v. *Hector*, 479 U. S. 85, 88–91 (1986).

The legislative history also supports the conclusion that Congress did not intend to provide nationwide service of process for private actions under the CEA. The House Re-

port on the Futures Trading Act of 1982 noted: "The availability of— . . . private rights of action—supplements, but does not substitute, for the regulatory and enforcement program of the CFTC . . . . The Committee fully expects [it will] not become necessary to rely on private litigants as a policeman of the Commodity Exchange Act." H. R. Rep. No. 97–565, pt. 1, p. 57 (1982). Thus, it is unremarkable that Congress enacted broader service provisions for CFTC actions than for private actions.

That the new § 22 of the CEA does not provide nationwide service of process does not end our inquiry, however, because Omni's cause of action accrued prior to the effective date of that section. See § 22(d), 7 U. S. C. § 25(d). Strictly speaking, Omni's argument may be that nationwide service is authorized under the implied cause of action recognized in *Curran*. This argument, however, is equally without force. See *Gravois* v. *Fairchild*, [1977–1980 Transfer Binder] CCH Comm. Fut. L. Rep. ¶ 20,706, p. 22,875 (ED La. 1978) (no nationwide service of process for implied private cause of action under CEA). The decision in *Curran* gave no consideration to service of process. Inasmuch as Congress carefully provided for service section by section in the CEA, we would not automatically graft nationwide service onto the implied private right of action. Indeed, the CEA's authorization for nationwide service section by section contrasts sharply with the service provisions of the securities laws. Each of those Acts uses a single section to provide for service "wherever the defendant may be found" for any action under the entire chapter. See § 22 of the Securities Act of 1933, 48 Stat. 86, as amended, 15 U. S. C. § 77v, and § 27 of the Securities Exchange Act of 1934, 48 Stat. 902, as amended, 15 U. S. C. § 78aa. In any event, now that Congress has enacted a private cause of action without nationwide service, we have a better perspective on Congress' view of the role of a private action within the statute as a whole. We see no reason to take a different position. Ac-

cordingly, we conclude that a nationwide service provision for a private action was not implicit in the CEA.

Since the CEA does not authorize service of summons on Wolff and Gourlay, we look to the second sentence of Rule 4(e), which points to the long-arm statute of the State in which the District Court sits—here, Louisiana. The District Court held that the requirements of the Louisiana long-arm statute, see n. 4, *supra*, were not met in this litigation. It noted that even the provision allowing a court to rely on the effects that the defendant causes within the State was "clearly not applicable" because it "applies only to a defendant who 'regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state.'" App. 22–23 (quoting La. Rev. Stat. Ann. § 13:3201(d) (West 1968)). Because the terms of the Louisiana statute were not met, the District Court considered a due process analysis unnecessary. Before us, Omni has not contended that Wolff and Gourlay may be reached under the Louisiana long-arm statute. Indeed, Omni has conceded that they may not. See Tr. of Oral Arg. 4. Thus, neither part of Rule 4(e) authorizes the service of summons on Wolff and Gourlay.

C

The dissenters in the Court of Appeals argued that even if authorization to serve process is necessary and cannot be found in Rule 4(e), the federal courts should act to fill the "interstices in the law inadvertently left by legislative enactment" by creating their own rule authorizing service of process in this litigation. See 795 F. 2d, at 431–432. We decline to embark on that adventure.

As an initial matter, it is unclear at this time whether it is open to us to fashion a rule authorizing service of process. At common law, a court lacked authority to issue process outside its district, and Congress made this same restriction the general rule when it enacted the Judiciary Act of Sept. 24, 1789, § 11, 1 Stat. 79. See *Robertson* v. *Railroad Labor*

Board, 268 U. S. 619, 622–623 (1925). Thus, specific legislative authorization of extraterritorial service of summons was required for a court to exercise personal jurisdiction over a person outside the district. Even were we to conclude that the bases for the rule in *Robertson* are no longer valid,[10] we would not necessarily have the power to create service-of-process rules. We would have to decide that the provisions of Rules 4(e) and 4(f), in authorizing service in certain circumstances, were not intended to prohibit service in all other circumstances. We would also have to find adequate authority for common-law rulemaking.[11] We need not decide these questions, however, since we would not fashion a rule for service in this litigation even if we had the power to do so.

We would consider it unwise for a court to make its own rule authorizing service of summons. It seems likely that Congress has been acting on the assumption that federal courts cannot add to the scope of service of summons Congress has authorized. This Court in the past repeatedly has stated that a legislative grant of authority is necessary. See, *e. g.*, *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 467–468 (1945). Indeed, as the dissent in the Court of Appeals conceded, "the weight of authority, both in the cases and in the commentary," 795 F. 2d, at 433, considers statu-

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[10] The successor to the provision of the first Judiciary Act relating to a district court's ability to serve process was revised in 1948, 62 Stat. 869, at which time the express territorial limitation on serving process was dropped. See 28 U. S. C. §§ 1391, 1401, 1693, 1695. See also note following 28 U. S. C. § 112 (1940 ed.) (tracing history of provision prior to 1948 revision). To the extent that the cases cited in *Robertson* rely on principles of territoriality, their force may have been undercut by the decision in *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), where the Court held that "presence [of the defendant] within the territorial jurisdiction of a court" was no longer necessary "to subject a defendant to a judgment *in personam*." *Id.*, at 316. We express no view as to continuing validity of *Robertson*'s rationales.

[11] See *Petrol Shipping Corp.* v. *Kingdom of Greece Ministry of Commerce, Purchase Directorate*, 360 F. 2d 103, 107–109 (CA2) (discussing court's authority to fashion an ad hoc rule to govern method of service), cert. denied, 385 U. S. 931 (1966).

tory authorization necessary to a federal court's service of summons. See, *e. g.*, *Max Daetwyler Corp.* v. *Meyer*, 762 F. 2d 290, 297 (CA3), cert. denied, 474 U. S. 980 (1985); *Wells Fargo & Co.* v. *Wells Fargo Express Co.*, 556 F. 2d 406, 414–416 (CA9 1977); 2 J. Moore, J. Lucas, H. Fink, & C. Thompson, Moore's Federal Practice ¶ 4.02[3], p. 4–67 (1987); 4 C. Wright & A. Miller, Federal Practice and Procedure § 1075, p. 302 (1969).

The strength of this longstanding assumption, and the network of statutory enactments and judicial decisions tied to it,[12] argue strongly against devising common-law service of process provisions at this late date for at least two reasons. First, since Congress concededly has the power to limit service of process, circumspection is called for in going beyond what Congress has authorized. Second, as statutes and rules have always provided the measures for service, courts are inappropriate forums for deciding whether to extend them. Legislative rulemaking better ensures proper consideration of a service rule's ramifications within the pre-existing structure and is more likely to lead to consistent application.[13]

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[12] Presumably acting on this widespread understanding that federal courts may serve process nationwide only when a federal statute authorizes such service, Congress has carefully provided for that kind of service of process when it so desired. See 2 J. Moore, J. Lucas, H. Fink & C. Thompson, Moore's Federal Practice ¶ 4.42[2.—1], pp. 4–386 to 4–391 (1987) (listing over 15 statutes).

[13] The legislative history of the Futures Trading Act of 1986, 100 Stat. 3556, provides an example why courts should not construct service of process rules ad hoc, even if they have the power to do so. Section 103 of that Act, 100 Stat. 3557, 7 U. S. C. § 15 (1982 ed., Supp. IV), amended the CEA to allow the CFTC to serve subpoenas outside the United States in the manner prescribed by the Federal Rules of Civil Procedure. The Conference Committee, however, expressed concern about the possibility of disrupting the Nation's foreign policy objectives and stated a preference that the new power be exercised with circumspection. See H. Conf. Rep. No. 99–995, pp. 21–22 (1986). We also note that with this amendment of the CEA, Congress declined still another opportunity to authorize nationwide service of process for a private action under the CEA.

Nothing about this case impels us to a different conclusion. If we do not create a rule here, the only harm to federal interests is the inability of a private litigant to bring a CEA action in the United States against an alien defendant who is not within the reach of the state long-arm statute. Since the CEA authorizes broader service of process in other enforcement actions, aliens cannot consider themselves immune from the Act's provisions. Also, a British court may be willing to enforce the CEA itself, if Omni brings suit against Wolff and Gourlay there.

We are not blind to the consequences of the inability to serve process on Wolff and Gourlay. A narrowly tailored service of process provision, authorizing service on an alien in a federal-question case when the alien is not amenable to service under the applicable state long-arm statute, might well serve the ends of the CEA and other federal statutes. It is not for the federal courts, however, to create such a rule as a matter of common law. That responsibility, in our view, better rests with those who propose the Federal Rules of Civil Procedure and with Congress.

IV

In summary, the District Court may not exercise jurisdiction over Wolff and Gourlay without authorization to serve process. That authorization is not found in either the CEA or the Louisiana long-arm statute to which we look under Rule 4(e). We reject the suggestion that we should create a common-law rule authorizing service of process, since we would consider that action unwise, even were it within our power.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

NATIONAL LABOR RELATIONS BOARD ET AL. *v.* UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 23, AFL–CIO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 86–594. Argued October 5, 1987—Decided December 14, 1987

National Labor Relations Board regulations implementing the unfair labor practice provisions of the National Labor Relations Act (NLRA or Act) provide that, after one of the Board's regional directors has filed a complaint but before a hearing is held thereon, the director may enter into either a formal or an informal settlement. The regulations allow a nonconsenting party to appeal a formal settlement to the Board's General Counsel and then to the Board itself, and the Board's order is subject to review in the federal courts of appeals under § 10(f) of the Act as "a final order of the Board." However, if such a settlement is informal in nature, the regulations permit an appeal to the General Counsel, but not to the Board. Respondent union filed charges alleging that an employer and another union had committed an unfair labor practice. After the Regional Director filed complaints, but before the scheduled hearing, the Director entered into an informal settlement agreement in which respondent refused to join. Pursuant to the regulations, respondent challenged the Director's action before the General Counsel, who sustained the settlement. Respondent then sought review in the Court of Appeals, which rejected the Board's contention that the petition for review should be dismissed for lack of jurisdiction to review an informal settlement that did not result in an order of the Board and that was entered into without hearings.

Held:

1. A postcomplaint, prehearing informal settlement decision by the General Counsel is not subject to judicial review under the NLRA. Pp. 123–130.

(a) The regulations' failure to provide for a judicially reviewable Board order on the General Counsel's postcomplaint, prehearing informal settlement decision is consistent with the NLRA and entitled to deference. The language, structure, and history of the NLRA, as amended, clearly reveal that Congress intended to differentiate between "prosecutorial" determinations, which are to be made solely by the General Counsel independent of the Board, and "adjudicatory" decisions, which are to be made by the Board subject to judicial review. It is a

reasonable construction of the NLRA to find that postcomplaint, prehearing settlement determinations are prosecutorial in nature, since, until a hearing is held, the Board has taken no action and has therefore made no adjudication. Moreover, the General Counsel's unreviewable discretion to file and withdraw complaints supports a reading that he or she also has final authority to dismiss a complaint in favor of an informal settlement before a hearing begins. The legislative history indicates a congressional intent to give the General Counsel final authority to handle all aspects of prosecutions, not merely the filing of complaints. The legislative history's silence regarding settlements does not indicate an intention to deny the Board the usual flexibility accorded an agency in interpreting its authorizing statute and in developing new regulations to meet changing needs, since Congress was aware of the importance of settlements to the administrative labor relations process. Pp. 123–128.

(b) Respondent's contention that, because the General Counsel acts "on behalf of the Board" under § 3(d) of the NLRA, his or her final determinations are reviewable under § 10(f) as orders "of the Board," is refuted by the Act's plain language, structure, and history. Clearly, an act "on behalf of" the Board is not the same as an act "of the Board" itself. Further, the Act's provisions, particularly §§ 3 and 10, evidence a congressional intent to distinguish unreviewable prosecutorial orders of the General Counsel from judicially reviewable orders of the Board. The NLRA's history also confirms this distinction, demonstrating that the "on behalf of the Board" language was added to make it clear that the General Counsel acts within the agency, not to imply that the General Counsel's acts should be considered acts of the Board. Moreover, since respondent concedes that the General Counsel's decision not to file a complaint is not reviewable under § 10(f), there is no merit in the argument that the General Counsel's settlement decisions may be reviewable. Pp. 128–130.

2. The General Counsel's settlement determinations may not be judicially reviewed under the Administrative Procedure Act (APA) as final agency actions "for which there is no other adequate remedy in a court," since APA review is unavailable where "statutes preclude judicial review." Although the NLRA does not contain language expressly precluding APA review, the NLRA's structure and history clearly establish the requisite congressional intent to do so. The NLRA is a comprehensive statute that exhaustively sets out the stages through which unfair labor practice charges must pass and expressly provides for judicial review only as to Board orders. APA review of General Counsel settlement decisions would run directly counter to this scheme, and would be extremely illogical, since appeals would be to the *district* courts, would involve lengthy proceedings in an area where Congress felt speed of

resolution to be necessary, and would provide a charged party with an incentive not to fulfill its settlement obligations until the proceedings were completed. Since postcomplaint, prehearing informal settlements represent a substantial portion of unfair labor practice charge dispositions, Congress could not have intended the potentially serious consequences that APA review would entail. Moreover, APA review would inevitably require the initial examination of the merits of charges to be made by federal courts rather than the Board, as Congress intended. Pp. 130–133.

788 F. 2d 178, reversed and remanded.

BRENNAN, J., delivered the opinion for a unanimous Court. SCALIA, J., filed a concurring opinion, in which REHNQUIST, C. J., and WHITE and O'CONNOR, JJ., joined, *post*, p. 133.

Norton J. Come argued the cause for petitioners. With him on the briefs were *Solicitor General Fried*, *Deputy Solicitor General Cohen*, *Andrew J. Pincus*, *Linda Sher*, and *Eric G. Moskowitz*.

Laurence Gold argued the cause for respondent. With him on the brief were *George Murphy*, *Peter Ford*, *David Silberman*, and *George Kaufmann*.*

JUSTICE BRENNAN delivered the opinion of the Court.

The question to be decided in this case is whether a federal court has authority to review a decision of the National Labor Relations Board's General Counsel dismissing an unfair labor practice complaint pursuant to an informal settlement in which the charging party refused to join. We hold that such a dismissal is not subject to judicial review under either the amended National Labor Relations Act or the Administrative Procedure Act.

I

In August 1984, respondent, the United Food Workers, filed unfair labor practice charges with the Pittsburgh re-

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**John S. Irving*, *Glenn Summers*, *Stephen A. Bokat*, and *Robin S. Conrad* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging reversal.

gional office of the National Labor Relations Board (Board). The charges alleged that Charley Brothers, Inc., the owner of several grocery stores, and the United Steelworkers Union (Steelworkers) had committed an unfair labor practice by bargaining for and executing a collective-bargaining agreement for a Charley Brothers store where the Steelworkers did not represent an uncoerced majority of the employees. The Regional Director duly investigated the charges, and entered into settlement negotiations with Charley Brothers and the Steelworkers. No agreement was reached, and the Regional Director filed a formal complaint substantially incorporating respondent's charges.

On September 24, 1984, Vic's Market's, Inc. (Vic's), bought the relevant store, and the Regional Director filed a second complaint that reflected this fact. A hearing on the complaints was scheduled for December 4, 1984. However, shortly before the hearing was to begin, Vic's, Charley Brothers, the Steelworkers, and the Regional Director came to a tentative settlement agreement. The agreement called for the charged parties to take certain remedial action in return for dismissal of the complaint, but they were not required to admit that they had committed any unfair labor practice.[1] The Regional Director invited respondent to join

[1] The agreement provided that Vic's and Charley Brothers (1) would not assist the Steelworkers' organizing efforts or interrogate employees as to their union sympathies; (2) would not recognize the Steelworkers or give effect to the collective-bargaining agreement unless the Steelworkers became the certified employee representative; (3) would not restrain or coerce the employees; and (4) would reimburse the employees for any dues already paid to the Steelworkers. The agreement also stated that the Steelworkers (1) would not accept assistance from Vic's or Charley Brothers; (2) would not give effect to the collective-bargaining agreement unless they became the certified employee representative; (3) would not restrain or coerce the employees in any way; and (4) would mail a notice of the agreement to all employees. It was further agreed that a notice would be posted for 60 days at the store outlining the provisions of the settlement agreement. However, the agreement did not require an admission by any party that an unfair labor practice had actually occurred, nor did it provide

the agreement, but respondent refused, citing a number of purported deficiencies.[2]

Eventually, the settlement was entered into by all parties except respondent, who, as permitted by Board regulations, challenged the Regional Director's action before the General Counsel. The General Counsel determined that there was no need for an evidentiary hearing and sustained the settlement. Respondent then sought review in the United States Court of Appeals for the Third Circuit.

The Board argued that the petition for review should be dismissed on the ground that the court lacked jurisdiction to review an informal settlement that did not result in an order of the Board and that was entered into before hearings began. Alternatively, the Board argued that the settlement should be sustained. The Court of Appeals, considering itself bound by its own precedent,[3] concluded that it had jurisdiction and on the merits held that the complaint should not have been dismissed without an evidentiary hearing. 788 F. 2d 178 (1986). We granted the Board's petition for a writ

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for a formal Board order or consent decree. Finally, the Regional Director agreed to dismiss the complaint without prejudice to reinstatement should any of the charged parties not comply with the agreement.

[2] First, respondent argued that it did not have an adequate opportunity to reach a settlement through amicable adjustment. Second, respondent contended that the 60-day posting period was too short to undo the damage already done by the improper representation; in other words respondent maintained that a fair election could not be held with so brief a posting period. Third, respondent requested special access to the store premises to enable it to compete in its organization efforts with the Steelworkers, who allegedly already had access to the store. Fourth, respondent objected to the lack of a provision for either a formal Board order or consent decree, or an admission that an unfair labor practice had occurred. Finally, respondent contended that the notice itself was ambiguous. The Regional Director amended the notice to meet respondent's concerns, but otherwise refused to alter the terms of the proposed settlement.

[3] *Leeds & Northrup Co.* v. *NLRB*, 357 F. 2d 527 (CA3 1966).

of certiorari to resolve a conflict among the Courts of Appeals.[4] 479 U. S. 1029 (1987). We now reverse.

II

Petitioners argue that the courts of appeals have no jurisdiction under the National Labor Relations Act (NLRA) to review settlement decisions of the General Counsel that do not result in Board orders and that are entered into before the commencement of hearings on the complaint. Respondent asserts two grounds for jurisdiction. The first is that all settlements occurring after a complaint is filed must be approved by the Board. Because final orders of the Board are judicially reviewable under § 10(f) of the NLRA, 49 Stat. 455, as amended, 29 U. S. C. § 160(f), respondent maintains that the courts of appeals have jurisdiction to review settlements. Alternatively, respondent argues that because the General Counsel acts "on behalf of the Board," his or her decisions are subject to judicial review as if they were orders "of the Board." Neither of respondent's submissions persuades us.

A

The NLRA, as originally enacted, granted the Board plenary authority over all aspects of unfair labor practice disputes: the Board controlled not only the filing of complaints, but their prosecution and adjudication. The Labor Management Relations Act, 1947 (LMRA), 61 Stat. 136, altered this structure.

One of the major goals of the LMRA was to divide the old Board's prosecutorial and adjudicatory functions between

[4] Compare 788 F. 2d 178 (CA3 1986) (case below) (finding that there is jurisdiction in the courts of appeals), and *International Ladies' Garment Workers Union* v. *NLRB*, 163 U. S. App. D. C. 263, 501 F. 2d 823 (1974) (same), with *Jackman* v. *NLRB*, 784 F. 2d 759 (CA6 1986) (finding no jurisdiction); cf. *Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America* v. *NLRB*, 339 F. 2d 795 (CA2 1964) (no hearing before the Board concerning settlement entered into by General Counsel).

two entities.[5] The House passed a bill that would have created a separate agency, known as the "office of Administrator of the National Labor Relations Act," to prosecute unfair labor practice complaints.[6] Under the House bill, the Board would have been retained to adjudicate the disputes. The Conference Committee did not go so far as to create a new agency. It did, though, determine that the General Counsel of the Board should be independent of the Board's supervision and review. To this end, the General Counsel is appointed by the President, with the advice and consent of the Senate, and is the "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints . . . and in respect of the prosecution of such complaints before the Board."[7] 29 U. S. C. § 153(d).

The methods and procedures for the resolution of unfair labor practice charges are set out in statutes and in regulations promulgated by the Board pursuant to congressional authority. § 156. A union, employer, or employee may bring an unfair labor practice charge to a regional office. Until such a charge is brought, the Board may take no enforcement action. *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132, 156 (1975). Once a charge is brought and investigated, the regional director may, in his discretion, dismiss it.

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[5] See, *e. g.*, 93 Cong. Rec. 6383 (1947) (remarks of Rep. Owens regarding the importance of the separation of powers within the agency); *id.*, at 6859 (analysis of Sen. Taft).

[6] H. R. 3020, 80th Cong., 1st Sess., § 101 (1947), amending § 4 of the NLRA, as sent to the Senate.

[7] LMRA, 61 Stat. 139, § 101, amending § 3 of the NLRA. This amendment added a new subsection (d), providing in pertinent part:

"There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board . . . shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law." 29 U. S. C. § 153(d).

Should this occur, the charging party may appeal to the General Counsel, but not to the Board. 29 CFR § 101.6 (1987).[8] Alternatively, the regional director may enter into an "informal settlement" agreement with the charged party. Such an agreement provides that the charged party will take or refrain from taking certain action, in return for which the regional director agrees not to file a complaint. If the charging party refuses to consent to this informal agreement, it may appeal to the General Counsel, but again, there is no provision for review by the Board. § 101.7.[9]

If the regional director concludes that the charges have merit, and if no informal settlement is reached, he may issue a complaint. Once a complaint issues, it may be disposed of by withdrawal before hearing, settlement, or formal adjudication.

The regional director is authorized to withdraw a complaint on his own motion at any time before the hearing. Such a withdrawal may be appealed to the General Counsel, but no Board review is available.[10]

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[8] Title 29 CFR § 101.6 (1987) states:

"If the complainant refuses to withdraw the charge as recommended, the Regional Director dismisses the charge. The Regional Director thereupon informs the parties of this section [*sic*, probably should be 'action'], together with a simple statement of the grounds therefor, and the complainant's right of appeal to the General Counsel in Washington, D. C., within 14 days. . . ."

[9] Section 101.7 provides:

"Before any complaint is issued or other formal action taken, the Regional Director affords an opportunity to all parties for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit. . . . These agreements, which are subject to the approval of the Regional Director, provide for an appeal to the General Counsel, as described in § 101.6, by a complainant who will not join in a settlement or adjustment deemed adequate by the Regional Director. . . ."

[10] Section 102.18 provides: "Any such complaint may be withdrawn before the hearing by the Regional Director on his own motion." An appeal to the General Counsel is permitted pursuant to § 102.19.

If the complaint is settled before the hearing, the disposition may take one of several forms. "Formal settlement" requires Board approval and is accompanied by the charged party's agreement to a remedial Board order and usually consent to the entry of an enforcement order in the court of appeals. § 101.9(b)(1).[11] "Informal settlement" is similar to the precomplaint settlement already discussed. The only difference is that rather than refraining from filing a complaint, the regional director dismisses the complaint without prejudice to reinstatement should the charged party not fulfill its part of the agreement. § 101.9(b)(2).[12]

Because a Board order is part of all formal settlements, Board approval is required before such an agreement may be executed. The applicable regulations expressly allow an opportunity for a nonconsenting party to appeal to the General Counsel, and from there to the Board. §§ 101.9(c)(1) and (2).[13] Ultimately, judicial review of the Board order is

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[11] Section 101.9 concerns settlements made after a complaint is filed. Subsection (b)(1), states:

"After the issuance of a complaint, the Agency favors a formal settlement agreement, which is subject to the approval of the Board in Washington, DC. In such an agreement, the parties agree to waive their right to hearing and agree further that the Board may issue an order requiring the respondent to take action appropriate to the terms of the settlement. Ordinarily the formal settlement agreement also contains the respondent's consent to the Board's application for the entry of a judgment by the appropriate circuit court of appeals enforcing the Board's order."

[12] Section 101.9(b)(2) states:

"In some cases, however, the Regional Director, who has authority to withdraw the complaint before the hearing § 102.18) *[sic]*, may conclude that an informal settlement agreement of the type described in § 101.7 is appropriate. Such agreement is not subject to approval by the Board and does not provide for a Board order. It provides for the withdrawal of the complaint."

[13] Sections 101.9(c)(1) and (2) read:

"(1) If after issuance of complaint but before opening of the hearing, the charging party will not join in a settlement tentatively agreed upon by the Regional Director, the respondent, and any other parties whose consent may be required, the Regional Director serves a copy of the proposed set-

available. 29 U. S. C. § 160(f). If the prehearing settlement is informal, an appeal is permitted to the General Counsel by a nonjoining party, but there is no provision for Board review. 29 CFR § 101.9(c)(3) (1987).[14]

Once the hearing on the complaint begins, the Board's regulations do not permit the General Counsel to enter into an unreviewable settlement agreement, even if it is "informal." Rather, a nonconsenting party may challenge the settlement before the administrative law judge, and an appeal is available from the judge's determination to the Board.[15] Judicial review is authorized from the Board's decision. 29 U. S. C. § 160(f).

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tlement agreement on the charging party with a brief written statement of the reasons for proposing its approval. . . .

"(2) If the settlement agreement approved by the Regional Director is a formal one, providing for the entry of a Board order, the settlement agreement . . . [is] submitted to Washington, D. C., where [it is] reviewed by the General Counsel. If the General Counsel decides to approve the settlement agreement, the charging party is so informed and the agreement and accompanying documents are submitted to the Board, upon whose approval the settlement is contingent. . . ."

[14] Section 101.9(c)(3) states: "If the settlement agreement approved by the Regional Director is an informal one, providing for the withdrawal of the complaint, the charging party may appeal the Regional Director's action to the General Counsel . . . ."

[15] Section 101.9(d) provides in relevant part:

"(1) If the settlement occurs after the opening of the hearing and before issuance of the administrative law judge's decision and there is . . . [a settlement proposal and if] any party will not join in the settlement agreed to by the other parties, the administrative law judge will give such party an opportunity to state on the record or in writing its reasons for opposing the settlement.

"(2) If the administrative law judge decides to accept or reject the proposed settlement, any party aggrieved by such ruling may ask for leave to appeal to the Board as provided in § 102.26."

(Section 102.26 provides for interlocutory appeals to the Board, which are discretionary. Petitioners have not suggested that an order of the administrative law judge *accepting* a settlement would not always be subject to Board review.)

Finally, the complaint may be disposed of by formal adjudication. The procedures for such determinations are provided by statute. Once a complaint issues, the charged party has the right to answer and the right to a hearing. If the Board finds, based on a preponderance of the testimony, that the charged party engaged in an unfair labor practice, it is empowered to issue a cease-and-desist order and other appropriate relief. Conversely, it must dismiss the complaint if it finds that no such practice occurred.[16] Any party, including the charging party,[17] aggrieved by an order of the Board granting or denying in whole or in part the relief sought may obtain review of the Board's final order in the court of appeals. 29 U. S. C. § 160(f).[18]

The dispute in the case before us is a narrow one. The parties agree that the General Counsel's approval of a determination not to file an unfair labor practice complaint is not subject to judicial review, whether or not it is the result of an

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[16] Section 10(c) of the NLRA, as set forth in 29 U. S. C. § 160(c), reads in relevant part:

"If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this [Act] . . . . If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. . . ."

[17] *Automobile Workers* v. *Scofield*, 382 U. S. 205 (1965).

[18] Section 10(f) of the NLRA, as set forth in 29 U. S. C. § 160(f), provides in relevant part:

"Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia . . . ."

informal settlement. See *Sears, Roebuck & Co.*, 421 U. S., at 148; *Vaca* v. *Sipes*, 386 U. S. 171, 182 (1967). The parties also agree that any settlement that ultimately results in Board approval is subject to judicial review, even if the settlement is informal but entered into after the hearing commenced. The sole dispute is whether a postcomplaint, prehearing informal settlement is subject to judicial review.

B

We first address respondent's argument that the regulations just described, which permit the General Counsel to determine the validity of a postcomplaint informal settlement, but do not provide for an appeal to the Board, are inconsistent with the NLRA. Essentially, this is an argument that respondent was entitled to a Board order subject to judicial review under 29 U. S. C. § 160(f).[19]

We review the validity of the relevant regulations, promulgated pursuant to congressional authority, under the standards prescribed in *INS* v. *Cardoza-Fonseca*, 480 U. S. 421 (1987). On a pure question of statutory construction, our first job is to try to determine congressional intent, using "traditional tools of statutory construction." If we can do so, then that interpretation must be given effect, and the regulations at issue must be fully consistent with it. *Id.*, at 446–448. See also *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843, and n. 9 (1984). However, where "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*, at 843. Under this principle, we have traditionally accorded the Board deference with regard to its interpretation of the NLRA as long as its interpretation is rational and consistent with the statute. See, *e. g.*, *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U. S. 27, 42 (1987); *Ford Motor Co.* v. *NLRB*, 441

[19] See n. 18, *supra*.

U. S. 488, 495, 497 (1979); *Beth Israel Hospital* v. *NLRB*, 437 U. S. 483, 501 (1978).[20]

The words, structure, and history of the LMRA amendments to the NLRA clearly reveal that Congress intended to differentiate between the General Counsel's and the Board's "final authority" along a prosecutorial versus adjudicatory line. Section 3(d) of the NLRA provides that the General Counsel has "final authority" regarding the filing, investigation, and "prosecution" of unfair labor practice complaints. Conversely, when the authority of the Board is discussed (with regard to unfair labor practice complaints), it is in the context of the *adjudication* of complaints. Specifically, § 10 of the Act refers to the Board and the procedures it must follow to decide unfair labor practice cases.

The history of the LMRA also reflects this dichotomy. The House Conference Report on the LMRA states: "The conference agreement does not make provision for an independent agency to exercise the investigating and prosecuting functions under the act, but does provide that there shall be a General Counsel of the Board . . . [who] is to have the final authority to act in the name of, but independently of any direction, control, or review by, the Board in respect of the investigation of charges and the issuance of complaints of

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[20] We also consider the consistency with which an agency interpretation has been applied, and whether the interpretation was contemporaneous with the enactment of the statute being construed. *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 446, n. 30 (1987); *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 142–143 (1976); *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 275 (1974). Since 1948 the agency's regulations have provided for Board approval only of settlements involving a Board order. See 29 CFR § 101.9(b) (1949) ("All settlement stipulations which provide for the entry of an order by the Board are subject to the approval of the Board in Washington"); 13 Fed. Reg. 4871 (1948). Further, the regional director has had the authority since 1947 to withdraw a complaint at any time before the hearing begins, on his own motion. 29 CFR § 102.18 (1949); 12 Fed. Reg. 5667 (1947). In 1967, the regulations were amended to substantially their present form. 32 Fed. Reg. 9547 (1967).

unfair labor practices, *and in respect of the prosecution of such complaints before the Board.*" H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 37 (1947) (emphasis added). Similarly, a summary submitted to the Senate detailing the Conference Committee compromise reads: "Further [the LMRA] *recognizes the principle of separating judicial and prosecuting functions* without going to the extent of establishing a completely independent agency. It accomplishes separation of functions within the framework of the existing agency by establishing a new statutory office, that is, a general counsel of the Board . . . ." 93 Cong. Rec. 6442 (1947) (emphasis added). The legislative debates further support this division. See, *e. g.*, *id.*, at 3423–3424 (1947) (remarks of Rep. Hartley); *id.*, at 6383 (remarks of Rep. Owens). Finally, the contemporaneous agency interpretation of the LMRA emphasized the prosecutorial/adjudicatory dichotomy. See 13 Fed. Reg. 654 (1948).

In light of the foregoing, the general congressional framework, dividing the final authority of the General Counsel and the Board along a prosecutorial and adjudicatory line, is easy to discern. Some agency decisions can be said with certainty to fall on one side or the other of this line. For example, as already discussed, decisions whether to file a complaint are prosecutorial. In contrast, the resolution of contested unfair labor practice cases is adjudicatory. But between these extremes are cases that might fairly be said to fall on either side of the division. Our task, under *Cardoza-Fonseca* and *Chevron*, is not judicially to categorize each agency determination, but rather to decide whether the agency's regulatory placement is permissible.

Respondent would have us hold that after a complaint is filed all dispositions can *only* be deemed adjudicatory. It is true that the filing of a complaint is the necessary first step to trigger the Board's adjudicatory authority. However, until a hearing is held the Board has taken no action; no *adjudication* has yet taken place. We hold that it is a reasonable con-

struction of the NLRA to find that until the hearing begins, settlement or dismissal determinations are prosecutorial.[21]

Moreover, we fail to see why the General Counsel should have the concededly unreviewable discretion to file a complaint, but not the same discretion to withdraw the complaint before hearing if further investigation discloses that the case is too weak to prosecute. See *International Assn. of Machinists & Aerospace Workers* v. *Lubbers*, 681 F. 2d 598, 604 (CA9 1982), cert. denied, 459 U. S. 1201 (1983); *George Banta Co.* v. *NLRB*, 626 F. 2d 354, 356–357 (CA4 1980), cert. denied, 449 U. S. 1080 (1981); *Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America* v. *NLRB*, 339 F. 2d 795, 799 (CA2 1964); cf. *Cuyahoga Valley R. Co.* v. *Transportation Union*, 474 U. S. 3 (1985) (the Secretary of Labor's decision to dismiss an Occupational Safety and Health Act complaint is not subject to review by the Occupational Safety and Health Review Commission). The General Counsel's unreviewable discretion to file and withdraw a complaint, in turn, logically supports a reading that he or she must also have final authority to dismiss a complaint in favor of an informal settlement, at least before a hearing begins.

But respondent contends that the LMRA's legislative history makes clear Congress' understanding that the Board would review all dismissals once a complaint is filed. Our examination of the legislative history discloses no such support for respondent's argument. Indeed, we find that the legislative history supports petitioners' position.

Respondent asserts that at the time the LMRA was passed, in 1947, the practice of the Board was to delegate to

[21] Both parties attempt to analogize the role of the General Counsel in an unfair labor practice setting to other contexts, specifically to a criminal prosecution or class action. We find these analogies of little aid. We have previously noted that the comparison between the General Counsel and a criminal prosecutor is "far from perfect." *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132, 156, n. 22 (1975). The same observation is true for class actions. The NLRA's division of authority must, at least in this case, be analyzed on its own terms.

an "anonymous committee" the resolution of appeals from determinations by regional directors not to file complaints. Respondent further argues that once a complaint was filed, *any* final disposition was subject to Board approval. The conclusion respondent would have us draw from this is that Congress intended only to replace the "anonymous committee" with the General Counsel, and that the authority that the Board had retained prior to 1947 survived and was carried forward in the LMRA amendments to the NLRA.[22]

This inference is too strained to withstand scrutiny. It is clear of course that Congress intended to place final authority regarding the filing of complaints in the General Counsel. But it is equally clear that Congress intended the scope of the General Counsel's authority to be far broader than respondent suggests. Congress intended that the General Counsel should not only resolve appeals regarding the filing of complaints, but that he or she should be the "final authority" concerning the "prosecution" of complaints as well, a function not performed by the "anonymous committee" prior to 1947. We repeat that Congress intended to create an officer independent of the Board to handle *prosecutions*, not merely the filing of complaints.

Moreover, the silence of the legislative history regarding settlements does not suggest that Congress was carrying forward the prior settlement structure. For Congress was

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[22] In support of this theory, respondent points to a statement by Senator Taft:

"Presumably, under the conference agreement such appeals would be routed to the General Counsel's office rather than to the Board. The assumption that the Board itself presently reviews these appeals, however, is utterly erroneous. According to the testimony of the chairman of the Board these appeals are considered by an anonymous committee of subordinate employees. What the conference amendment does is simply to transfer this 'vast and unreviewable power' from this anonymous little group to a statutory officer responsible to the President and to the Congress." 93 Cong. Rec. 6859 (1947).

Respondent also notes that the legislative history is silent concerning the procedure for entering into settlements.

aware that settlements constitute the "lifeblood" of the administrative process, especially in labor relations.[23] Given their importance, we cannot attribute to Congress an intention to deny the Board the usual flexibility accorded an agency in interpreting its authorizing statute and in developing new regulations to meet changing needs.[24]

In short, the Board's regulations are consistent with amended NLRA. Respondent was not entitled to Board review of the settlement.

C

Alternatively, respondent argues that because the General Counsel acts "on behalf of the Board" his or her final determinations are reviewable under the NLRA as orders "of the Board." We find this argument, too, unpersuasive.

The plain language cited by respondent reflects that the General Counsel acts "*on behalf of*" the Board. 29 U. S. C. § 153(d).[25] Clearly this is not the same as an act "of the Board" itself. 29 U. S. C. § 160(f).[26]

Further, the structure of the Act, far from supporting respondent, leads inescapably to the conclusion that Congress distinguished orders of the General Counsel from Board orders. The statute describing the organization of the agency,

[23] See Attorney General's Committee on Administrative Procedure, Administrative Procedure in Government Agencies, Final Report, S. Doc. No. 8, 77th Cong., 1st Sess., 35 (1941).

[24] The precise form of settlement at issue in this case was not prevalent prior to the LMRA's passage in 1947. At that time, informal settlements were usually entered into only before a complaint was filed. Once a complaint was filed, it could not be withdrawn without Board approval, and the Board only approved a settlement agreement if it contained a stipulation for the entry of a remedial Board order and entry of a consent decree to court of appeals enforcement, "or compelling reasons appear[ed] for its failure to do so." Attorney General's Committee on Administrative Procedure, Administrative Procedure in Government Agencies: National Labor Relations Board, S. Doc. No. 10, 77th Cong., 1st Sess., pt. 5, pp. 7–8 (1941).

[25] See n. 7, *supra*.

[26] See n. 18, *supra*.

in which the "on behalf of the Board" language appears, differentiates between the two independent branches. 29 U. S. C. § 153. The structure of § 10 of the NLRA (29 U. S. C. § 160) emphasizes the distinction. Section 10 specifies the procedure for *adjudicating* unfair labor practice charges. Subsection 10(f) provides that final decisions "of the Board" shall be judicially reviewable, and, in the context of the entire section, discloses Congress' decision to authorize review of *adjudications*, not of *prosecutions*. Fairly read, this may encompass any Board adjudication resolving an unfair labor practice complaint, whether by final order, consent decree, or settlement. But it plainly cannot be read to provide for judicial review of the General Counsel's prosecutorial function.

The history of the Act confirms the distinction between orders of the General Counsel and Board orders. In the House bill, the General Counsel was styled the "Administrator of the National Labor Relations Act," and headed a separate agency. The Conference Committee decided to place the General Counsel within the agency, but to make the office independent of the Board's authority. The Committee added the language "on behalf of the Board" to make it clear that the General Counsel acted within the agency, not to imply that the acts of the General Counsel would be considered acts of the Board.[27]

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[27] See 93 Cong. Rec. 6383 (1947) (remarks of Reps. Owens, Hartley, and MacKinnon) (emphasis added):

"Mr. OWENS. I believe that one of the most important portions of this bill is the division of powers; that is, the division of the functions, the investigation, the prosecution, the complaints, and the judicial end. The gentleman mentioned that the general counsel would be absolutely independent.

"In the language [the bill] constantly refers to the Board.

. . . . .

"It is my understanding that the conference is saying to the House at this time that those different sections, where they mention the Board, mean that it is the general counsel who shall have the power to proceed

Finally, since respondent concedes that the General Counsel's decision not to file a complaint is not reviewable under § 10(f), we perceive no merit or logic in the argument that a settlement decision of the General Counsel may be.

Again, the language, structure, and history of the NLRA, as amended, clearly differentiate between "prosecutorial" determinations, to be made solely by the General Counsel and which are not subject to review under the Act, and "adjudicatory" decisions, to be made by the Board and which are subject to judicial review. As the decision in this case was "prosecutorial," it cannot be judicially reviewed under the NLRA.

III

Respondent argues that if the NLRA provides no judicial review of "prosecutorial" determinations, they may be reviewed under the Administrative Procedure Act (APA) as final agency actions "for which there is no other adequate remedy in a court." 5 U. S. C. § 704. It is true that the General Counsel's decision was a "final" action, and that there is no other adequate remedy in a court. But review under the APA is unavailable of actions specified in 5 U. S. C. § 701(a), that is, (1) where "statutes preclude judicial review"; or (2) where "agency action is committed to agency discretion by law." Subsection (1) applies in this case.

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with the investigation, with the complaint, and shall have complete power over the attorneys who are prosecuting; that the Board shall not control him or have the right of review in any way. Is that correct?

"Mr. HARTLEY. The gentleman's opinion is absolutely correct. The reference to the Board was necessary *because, in order to have this man independent of the Board, we had to use the term 'Board.'* Otherwise we would have had to set up a completely independent agency. . . . *He acts on behalf of the Board but completely independent of the Board.*

"Mr. MACKINNON. But while he is completely independent of the Board, he is authorized insofar as his duties are concerned, *to act in the name of the Board?*

"Mr. HARTLEY. *Yes; in the name of the Board.*"

The statutory preclusion of judicial review must be demonstrated clearly and convincingly. *Southern R. Co.* v. *Seaboard Allied Milling Corp.*, 442 U. S. 444, 462 (1979); *Dunlop* v. *Bachowski*, 421 U. S. 560, 567 (1975). In the absence here of statutory language expressly precluding APA review, the Court must examine the structure and history of the statute to determine whether the requisite congressional intent to bar judicial review is clearly established.

The NLRA leaves no doubt that it is meant to be, and is, a comprehensive statute concerning the disposition and review of the merits of unfair labor practice charges. In particular, § 10 exhaustively sets out the stages through which such charges may pass, from the filing of a complaint, to a Board determination, and to judicial enforcement and review. Moreover, in the entire NLRA, judicial review is expressly provided only in respect of Board orders. We have already determined, *supra*, at 130, that Congress purposely excluded prosecutorial decisions from this review. We proceed to demonstrate why it would be illogical in the extreme to hold that Congress did so only to permit review under the APA.[28]

To allow judicial review through the APA of the General Counsel's settlement determinations would run directly counter to the structure of the NLRA. Appeals from final orders or dispositions of the Board are expressly directed to the courts of appeals. Respondent nevertheless urges that the statute should be read to allow an APA suit, brought in the *district* court, to review final agency orders that are not adjudications. Such review would involve lengthy judicial

[28] Our conclusion is bolstered by the observation that nowhere in the legislative history of the LMRA is the availability of APA review adverted to, despite reference to the APA in other contexts. For example, opponents of the LMRA amendment to the NLRA creating an independent General Counsel cited to the APA as providing the best division between prosecutorial and adjudicatory functions within an agency. 93 Cong. Rec. 6455 (1947) (remarks of Sen. Morse); *id.*, at 7487 (President Truman's veto message); *id.*, at 6859 (analysis of Sen. Taft rebutting these attacks).

proceedings in precisely the area where Congress was convinced that speed of resolution is most necessary. This case provides a good illustration of what Congress set out to avoid. Charges were filed by respondent in August 1984. By January 1985 the settlement had been reached and all administrative review was exhausted. However, the court proceedings took almost 15 months.[29]

This sort of delay, unavoidable in the judicial setting, is untenable in the settlement context, for until the court ruled the parties could not know whether their settlement agreement was valid. In future cases, a charged party would have an incentive not to carry out its part of the bargain while judicial review is pending for fear that the settlement might be invalidated. Obviously, the willingness of charged parties to resolve unfair labor practice charges quickly and expeditiously by way of an informal settlement after a complaint is filed would be severely constrained if APA review were allowed.

The resulting consequences for the agency and the enforcement of the Act could be most serious. In 1983 almost one-third of all unfair labor practice charges brought (excluding those terminated through voluntary withdrawal by the charging party or outright dismissal of the charges) were disposed of by way of an informal settlement reached after a complaint was filed, but before a hearing began.[30] This hazard to the functioning of the "lifeblood" of the administrative process could certainly not have been the congressional intention.

Finally, APA review of these settlements would inevitably require the federal courts, in the first adjudicatory instance, to examine the merits of unfair labor practice charges.

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[29] The proceedings would have taken even longer had the action been brought in the District Court and then appealed to the Court of Appeals, as would happen under the APA.

[30] 48 NLRB Ann. Rep. 183 (Table 7) (1983). The number of cases disposed of in this manner was 3,803.

However, Congress has made plain its unequivocal desire that, absent statutory direction to the contrary, such examinations be made first by the Board, or not at all. At least in the context of this statute, we are left with no doubt that Congress intended the right of judicial review on the merits of an unfair labor practice charge to be had only through the express provisions of the NLRA.

Given the comprehensive nature of the NLRA with regard to unfair labor practice charges, and the absurd results of allowing an APA action to be brought where there is no judicial review provided in the Act, we conclude that the exception defined in 5 U. S. C. § 701(a)(1) bars review here.[31]

IV

We conclude that the Court of Appeals had no jurisdiction to entertain this action under either the NLRA or the APA. Consequently, we need not determine whether an evidentiary hearing should have been ordered. We reverse the judgment of the Court of Appeals and remand with instructions to dismiss the cause for want of subject-matter jurisdiction.

It is so ordered.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR join, concurring.

I join the Court's opinion, and write separately only to note that our decision demonstrates the continuing and unchanged vitality of the test for judicial review of agency determinations of law set forth in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984). Some courts have mistakenly concluded otherwise, on the basis of dicta in *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 446–448 (1987). See, *e. g.*, *Union of Concerned Scientists* v.

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[31] Because we find APA review precluded by statute, we need not address petitioners' alternative argument that 5 U. S. C. § 701(a)(2) (acts committed to agency discretion) also bars review.

NRC, 266 U. S. App. D. C. 381, 386, 824 F. 2d 108, 113 (1987); *International Union, United Automobile, Aerospace and Agricultural Implement Workers* v. *Brock*, 259 U. S. App. D. C. 457, 460–461, 816 F. 2d 761, 764–765 (1987); *Adams House Health Care* v. *Heckler*, 817 F. 2d 587, 593–594 (CA9 1987). If the dicta of *Cardoza-Fonseca*, as opposed to its expressed adherence to *Chevron*, were to be applied here, surely the question whether dismissal of complaints requires Board approval and thus qualifies for judicial review under 29 U. S. C. § 160(f) would be "a pure question of statutory construction" rather than the application of a "standar[d] to a particular set of facts," as to which "the courts must respect the interpretation of the agency," 480 U. S., at 446, 448. Were we to follow those dicta, therefore, we would be deciding this issue conclusively and authoritatively, rather than merely "decid[ing] whether the agency's regulatory placement is permissible," *ante*, at 125. The same would be true, moreover, of the many other decisions alluded to by the Court in which "we have traditionally accorded the Board deference with regard to its interpretation of the NLRA," *ante*, at 123. Those cases, and this, are decided correctly only because "the statute is silent or ambiguous" with respect to an issue relevant to the agency's administration of the law committed to its charge—which is the test for deference set forth in *Chevron*.

Syllabus

MULLINS COAL CO., INC. OF VIRGINIA, ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 86-327. Argued October 14, 1987—Decided December 14, 1987

Section 203(a) of the Secretary of Labor's "interim regulations" governing black lung benefits claims filed between July 1, 1973, and April 1, 1980, provides that a claimant who engaged in coal mine employment for at least 10 years is entitled to an "interim presumption" of eligibility for disability benefits if he meets one of four medical requirements: (1) a chest X ray "establishes" the presence of pneumoconiosis; (2) ventilatory studies establish the presence of any respiratory or pulmonary disease of a specified severity; (3) blood gas studies demonstrate an impairment in the transfer of oxygen from the lungs to the blood; or (4) other medical evidence, including the documented opinion of a physician exercising reasonable medical judgment, establishes a totally disabling respiratory impairment. Section 203(b) provides that "all relevant medical evidence shall be considered" in the adjudication of a claim, and that the interim presumption is rebutted if the evidence establishes (1) that the claimant is doing his usual or comparable work; (2) that he is capable of doing such work; (3) that his disability did not arise, even in part, out of coal mine employment; or (4) that he does not have pneumoconiosis. At the hearing on respondent Ray's 1976 claim, the record proved that Ray had 16 years of coal mine employment and contained one qualifying and seven nonqualifying X-ray interpretations, two qualifying and four nonqualifying ventilatory studies, and one qualifying and five nonqualifying physicians' opinions. After weighing the evidence, the Administrative Law Judge (ALJ) held that Ray was not entitled to the benefit of the interim presumption, and issued an order denying benefits, which the Benefits Review Board affirmed. However, the Court of Appeals reversed, rejecting the Secretary's position that § 203(a) requires the claimant to establish one of the qualifying facts by a preponderance of the evidence. The court held instead that a single item of qualifying evidence is always sufficient to invoke the interim presumption, and, upon finding that the presumption had been invoked in this case by the two qualifying ventilatory studies and the qualifying physician's opinion, remanded for the

ALJ to determine whether the presumption had been rebutted by Ray's employer.

Held: Section 203(a) requires that the claimant establish at least one of the qualifying facts by a preponderance of the evidence. Pp. 146–160.

(a) Section 203(a)'s plain language does not mandate that the interim presumption be invoked on the basis of a single item of qualifying evidence. The Court of Appeals' reading of § 203(a)(1) as though it merely requires X-ray evidence of the presence of pneumoconiosis ignores the fact that § 203(a)(1) expressly requires an X ray that actually "establishes" the presence of the disease. It is not the X ray in isolation that establishes that presence; rather, the regulation must, at a minimum, have reference both to the X ray itself and to interpretations by qualified experts. The Secretary's view of the regulation, which would render some evidence inadmissible for certain aspects of rebuttal, is not inconsistent with § 203(b)'s requirement that "all relevant evidence shall be received" in adjudicating a claim, since nothing in the Secretary's position prevents all relevant evidence from being considered at some point in the proof process, and nothing in the regulation requires that all relevant medical evidence be considered at the rebuttal phase. Moreover, the Secretary's interpretation is not rendered internally inconsistent by his position that, if the claimant invokes the presumption by establishing the existence of pneumoconiosis under § 203(a)(1), the employer may not try to disprove the disease under § 203(b)(4), since nothing in the regulation *requires* each rebuttal subsection to be fully available in each case. Furthermore, the Secretary's position will not permit an employer to prevail solely on a single negative X-ray interpretation in violation of a statutory provision prohibiting claim denials on that basis. Thus, the Secretary's interpretation of § 203 is entirely consistent with the regulation's text. Pp. 146–152.

(b) The Court of Appeals erred in finding that the legislative history of the black lung benefits statutes requires a single-item-of-evidence invocation burden. Section 203(a)'s interim presumption derives directly from, and is substantially similar to, an interim presumption for black lung claims promulgated by the Social Security Administration, under which ALJs have routinely weighed the evidence at the invocation stage without judicial objection and often with explicit court approval. Pp. 152–155.

(c) The fact that a single item of qualifying evidence *may* often be sufficient to invoke the interim presumption does not compel the conclusion that such evidence *must* always be sufficient. The factual understanding underlying the presumption—that it is highly probable that a long-term coal miner is totally disabled by pneumoconiosis arising from his employment if he can prove any of the regulation's medical require-

ments—is not present when the claimant merely offers a single item of qualifying evidence that is overcome by more reliable conflicting evidence. Similarly, the policy concern underlying the presumption—that long-term miners who are truly diseased should not have to undertake the difficult task of proving that their diseases are totally disabling and coal mine related, or that they are in fact pneumoconiosis—is not implicated if a miner is not actually suffering from the type of ailment with which Congress was concerned. Thus, the Secretary's reading of the interim presumption's invocation burden is eminently reasonable and deserving of substantial deference. Pp. 156–160.

785 F. 2d 424, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which, REHNQUIST, C. J., and WHITE, BLACKMUN, O'CONNOR, and SCALIA, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 161.

Mark E. Solomons argued the cause for petitioners. With him on the brief was *John D. Maddox*. *Michael K. Kellogg* argued the cause and filed briefs for the federal respondent in support of petitioners. On the briefs were *Solicitor General Fried*, *Deputy Solicitor General Ayer*, *Richard G. Taranto*, *George R. Salem*, *Allen H. Feldman*, and *Barbara J. Johnson*. *David Allen Barnette* filed a brief for Westmoreland Coal Co., respondent under this Court's Rule 19.6, in support of petitioners.

C. Randall Lowe argued the cause for respondents and filed a brief for respondent Ray. *S. Strother Smith III* filed a brief for respondent Stapleton.*

JUSTICE STEVENS delivered the opinion of the Court.

In 1978 the Secretary of Labor promulgated "interim regulations" to govern the processing of claims for black lung benefits filed between July 1, 1973, and April 1, 1980. See

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**Grant Crandall*, *Michael H. Holland*, and *Patrick Nakamura* filed a brief for the United Mine Workers of America as *amicus curiae* urging affirmance.

Robert F. Stauffer filed a brief for the National Coal Association as *amicus curiae*.

20 CFR pt. 727 (1987). Section 203 of those regulations prescribes five ways in which a claimant may prove that he is entitled to an "interim presumption" of eligibility. The question in this case concerns the burden of proof that the claimant must satisfy to invoke the presumption. The Court of Appeals held, *Stapleton* v. *Westmoreland Coal Co.*, 785 F. 2d 424 (CA4 1986) (en banc), that a single item of qualifying evidence is always sufficient whereas the Secretary of Labor contends that his regulation requires the claimant to establish at least one of the five qualifying facts by a preponderance of the evidence. Because we are not persuaded that the Secretary has misread his own regulation, we reverse.

I

Although some aspects of the black lung benefits program are rather complex, its broad outlines and relevant statutory provisions can be briefly described. Prolonged exposure to coal dust has subjected hundreds of thousands of coal miners to pneumoconiosis—a serious and progressive pulmonary condition popularly known as "black lung." The tragic consequences of this crippling illness prompted Congress to authorize a special program for the benefit of its victims in 1969. Because that program has been developed through several statutory enactments,[1] different rules govern claims filed during different periods of time. Those filed prior to July 1, 1973, were processed by the Social Security Administration (SSA) pursuant to regulations promulgated by the Secretary of the Department of Health, Education, and Welfare

[1] Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792, 30 U. S. C. § 801 *et seq.*, was amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, 30 U. S. C. § 901 *et seq.*, the Black Lung Benefits Revenue Act of 1977, 92 Stat. 11, the Black Lung Benefits Reform Act of 1977, 92 Stat. 95, the Black Lung Benefits Amendments of 1981, 95 Stat. 1643, the Black Lung Benefits Revenue Act of 1981, 95 Stat. 1635, and the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. 99–272, § 13203(a)(d), 100 Stat. 312, 313.

(HEW); when allowed, these "Part B" claims were paid from federal funds.[2] "Part C" claims[3] are those filed on or after July 1, 1973; they are paid by private employers or by a fund to which the employers contribute, and they are administered by the Director of the Office of Workers' Compensation Programs (the Director) pursuant to regulations promulgated by the Secretary of Labor (the Secretary). Part C of the program includes two subparts: claims filed after April 1, 1980, which are governed by "permanent criteria,"[4] and those filed prior to April 1, 1980, which are governed by the "interim regulations" at issue in this case. Despite the "interim" designation, these regulations are extremely important because they apply to about 10,000 pending claims.

There is no dispute about the Secretary's authority to promulgate the interim regulations.[5] Nor is there any suggestion that they violate any express statutory command. The statute does require the Secretary to establish criteria for eligibility that "shall not be more restrictive than" the criteria that the Secretary of HEW had established for the administration of the Part B program,[6] but the Court of Appeals did not hold that § 203 violates this standard. The statute also requires that "all relevant evidence" shall be considered, but it is clear that the regulation is consistent with that requirement[7]—the only dispute is over how much of the

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[2] Part B of the Act is codified at 30 U. S. C. § 921 *et seq.*

[3] Part C is codified at 30 U. S. C. § 931 *et seq.*

[4] See 20 CFR pt. 718 and § 725.4(a) (1987).

[5] See 30 U. S. C. § 902(f)(1). As the Court of Appeals noted:

"The statute . . . leaves to the Secretary how the presumption is to be triggered and rebutted and how the various burdens of persuasion and production are to be allocated between the claimant and the employer." *Stapleton* v. *Westmoreland Coal Co.*, 785 F. 2d 424, 433 (CA4 1986) (en banc).

[6] See 30 U. S. C. § 902(f)(2).

[7] The statute provides, in part:

"In carrying out the provisions of this part, the Secretary shall to the maximum extent feasible (and consistent with the provisions of this part) utilize the personnel and procedures he uses in determining entitlement to

relevant evidence may be considered in determining whether the interim presumption shall be invoked. Thus, there is no need to parse statutory language to decide this case.

The Court of Appeals' holding rests, at bottom, on two propositions: (1) the regulation's plain language mandates that the presumption be invoked on the basis of a single item of qualifying evidence; and (2) the Secretary's reading is not faithful to the purposes of the program as reflected in its legislative history. We shall consider each of these propositions after reviewing the substance of the regulation and the facts of the one case that presents the legal question we must decide.[8]

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disability insurance benefit payments under section 223 of the Social Security Act [42 U. S. C. § 423], but no claim for benefits under this part shall be denied solely on the basis of the results of a chest roentgenogram [X ray]. In determining the validity of claims under this part, *all relevant evidence shall be considered*, including, where relevant, medical tests such as blood gas studies, X-ray examination, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history, evidence submitted by the claimant's physician, or his wife's affidavits, and in the case of a deceased miner, other appropriate affidavits of persons with knowledge of the miner's physical condition, and other supportive materials." § 923(b) (emphasis added).

The Court of Appeals was of the view that the regulation itself requires all relevant evidence to be considered on rebuttal, and that the Secretary's reading violated this requirement. See *infra*, at 149. To the extent that the presumption is made irrebuttable under the Secretary's reading, see *infra*, at 149–150, and n. 26, the court thought the statutory requirement that "all relevant evidence" shall be considered violated as well. See 785 F. 2d, at 434. This conclusion is clearly incorrect, for the same reasons that the court's conclusion regarding the regulation is incorrect. See *infra*, at 149–150. In short, the opportunity, under the Secretary's reading, to present relevant evidence at the invocation stage, satisfies the statutory requirement that "all relevant evidence" shall be considered.

[8] The resolution of the legal question apparently will not affect two of the individual respondents. Even though the Administrative Law Judge (ALJ) concluded that respondent Gerald R. Stapleton had properly invoked the interim presumption, he also concluded that it had been rebutted. The Court of Appeals majority agreed with that analysis, and the dissent, adopting the Secretary's approach, agreed with the result on the ground that the presumption should not have been invoked. For respondent

II

Disability benefits are payable to a miner if (a) he or she is totally disabled, (b) the disability was caused, at least in part, by pneumoconiosis, and (c) the disability arose out of coal mine employment. All three of these conditions of eligibility are presumed if the claimant was engaged in coal mine employment for at least 10 years and if the claimant meets one of four medical requirements:[9] (1) a chest X ray establishes the presence of pneumoconiosis; (2) ventilatory studies establish the presence of a respiratory or pulmonary disease—not necessarily pneumoconiosis—of a specified severity; (3) blood gas studies demonstrate the presence of an impairment in the transfer of oxygen from the lungs to the blood; or (4) other

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Glenn Cornett, the ALJ found that the presumption had been properly invoked and that it had not been rebutted. Both the majority and the dissent agreed with those conclusions. With respect to respondent Luke R. Ray, however, the majority disagreed with the ALJ's determination that the presumption had not been properly invoked, and remanded for a determination whether the presumption was rebutted. The dissent agreed with the ALJ, and would have affirmed the denial of benefits.

We think it helpful at this point to add a note about the posture of the parties to this case. The petitioners, who filed a joint petition pursuant to this Court's Rule 19.4, are Mullins Coal Co., the Old Republic Insurance Co., and Jewell Ridge Coal Corp. Mullins and Jewell Ridge employed, respectively, respondents Cornett and Ray, both of whom were victorious before the Court of Appeals, but only one of whom, Ray, has filed a brief in this Court. Old Republic is Mullins' black lung benefits insurance carrier. In addition to Cornett and Ray, respondents are: the Director, Office of Workers' Compensation Programs, who administers the Department of Labor's (Labor) black lung benefits program and whose brief lays out the Secretary's position challenging the Court of Appeals' conclusion regarding a claimant's invocation burden; Gerald R. Stapleton, whose benefits denial was affirmed by the Court of Appeals, see *Stapleton* v. *Westmoreland Coal Co.*, *supra*, and who attacks that judgment as a respondent pursuant to Rule 19.6; and Westmoreland Coal Co., who employed Stapleton and is thus happy with the result below, but who is unhappy with the ramifications of the Court of Appeals' decision and has accordingly filed a brief in support of petitioners, also pursuant to Rule 19.6.

[9] A fifth alternative, available in a death benefit claim, is not at issue in this case. See 20 CFR § 727.203(a)(5) (1987), quoted in n. 10, *infra*.

medical evidence, including the documented opinion of a physician exercising reasonable medical judgment, establishes the presence of a totally disabling respiratory impairment.[10]

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[10] The full text of § 727.203(a) reads as follows:

"(a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:

"(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);

"(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV	*MVV*
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

"(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table:

Arterial pO_2	*Arterial pCO_2 equal to or less than (mm.Hg.)*
30 or below	70
31	69
32	68
33	67

[Footnote 10 is continued on p. 143]

It is noteworthy that only the first of the four alternative methods of invoking the presumption requires proof that the claimant's disease is in fact pneumoconiosis. None of the methods requires proof of causation, and only the fourth requires proof of total disability.

The second paragraph in the regulation describes how the presumption may be rebutted.[11] It first provides that in the adjudication of a claim, "all relevant medical evidence shall be considered." It then provides that the presumption is rebutted if the evidence establishes that the claimant is doing or is

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34	66
35	65
36	64
37	63
38	62
39	61
40–45	60
Above 45	Any value.

"(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

"(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment."

[11] The full text of § 727.203(b) reads as follows:

"(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

"(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

"(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

"(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

"(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis."

capable of doing his usual or comparable work, that his disability did not arise, even in part, out of coal mine employment, or that he does not have pneumoconiosis. Thus, in order to rebut the interim presumption the employer has the burden of proving that at least one of the three conditions of eligibility is not satisfied.[12]

III

Respondent Ray filed a claim for disability benefits with the Secretary in 1976. At the hearing before the ALJ, he proved that he had 16 years of coal mine employment. The ALJ placed 47 exhibits from the Director's file into evidence,[13] and the employer introduced four additional exhibits. The record contained one qualifying[14] X-ray interpretation, two qualifying ventilatory studies, and one qualifying physician's opinion. The record, however, also included seven

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[12] Petitioners agree that the employer's rebuttal burden is one of proof as well as production. The Secretary also takes the position that the presumption should be invoked in cases of "true doubt"—that is, if the claimant's and employer's invocation evidence is of equal weight. Brief for Federal Respondent 33, 39. This position ensures that the employer will win, on invocation or rebuttal, only when its evidence is *stronger* than the claimant's. The Benefits Review Board (BRB) "has consistently upheld the principle that, where true doubt exists, that doubt shall be resolved in favor of the claimant." *Lessar* v. *C. F. & I. Steel Corp.*, 3 BLR 1–63, 1–68 (1981).

[13] Medical evidence is initially submitted to the Director by the claimant and the employer, and through examinations and tests ordered by the Director himself. See §§ 725.2(b) and 725.404 *et seq.* When a hearing is requested or ordered, all evidence previously submitted to the Director becomes part of the hearing record. See § 725.421(b)(4).

[14] The Court of Appeals used the term "qualifying" to refer to positive medical evidence that would suffice, absent contrary evidence of the same type, to invoke the presumption. For example, an X ray that disclosed pneumoconiosis (§ (a)(1)) or ventilatory studies that revealed a respiratory or pulmonary impairment of sufficient magnitude (§ (a)(2)) would constitute qualifying evidence. Conversely, negative X-ray results or ventilatory studies that failed to reveal a great enough impairment would be deemed "nonqualifying" evidence.

nonqualifying X-ray interpretations, four nonqualifying ventilatory studies, and five nonqualifying physicians' opinions.[15] After weighing the X-ray evidence, the ALJ concluded that it did not establish that Ray had pneumoconiosis,[16] and after balancing all the ventilatory studies, he concluded that they did not establish the presence of a chronic respiratory or pulmonary disease.[17] Additionally, the ALJ found that the other medical evidence, including documented physicians' opinions, did not establish the presence of a totally disabling respiratory or pulmonary impairment.[18] He therefore held

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[15] That Ray did not object to the nonqualifying evidence contained in these exhibits is of no moment; what matters in this case is not *whether* nonqualifying evidence may be introduced into the record (all parties agree it may), but *when* that evidence may be considered. During Ray's hearing, the ALJ simply admitted all relevant evidence and took testimony. It was only in his written decision that the ALJ revealed whether he considered nonqualifying evidence during invocation or only on rebuttal.

[16] "I give greatest weight to the seven negative X-rays, three of which were read by qualified 'B' readers. (Dir. Exbs. 24, 25, 26) I conclude that the X-ray evidence does not establish that Claimant has pneumoconiosis. 20 CFR § 727.203(a)(1)." App. to Pet. for Cert. 129a.

"'B' readers are radiologists who have demonstrated their proficiency in assessing and classifying X-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health & Human Services." *Consolidation Coal Co.* v. *Chubb*, 741 F. 2d 968, 971, n. 2 (CA7 1984).

[17] "The more recent ventilatory studies performed in 1977 and 1980 do not demonstrate the presence of a chronic respiratory or pulmonary disease as defined by the aforementioned regulation. (Dir. Exb. 19; Emp. Exb. 1) These findings are supported by earlier ventilatory studies in 1976 and 1975. (Dir. Exbs. 16, 17) I conclude that the weight of evidence necessitates a finding that the ventilatory studies do not establish the presence of a chronic respiratory or pulmonary disease." App. to Pet. for Cert. 130a.

[18] "In light of the other medical opinions [not finding a totally disabling respiratory or pulmonary impairment], I do not find Dr. Warden's opinion of total disability, as a result of obstructive lung disease which is *probably* related to dust exposure, persuasive. Dr. Warden himself appears unsure that exposure to coal dust caused the diagnosed lung disease." *Id.*, at 132a–133a (emphasis in original). We note that under § (a)(4) a qualifying

that Ray was not entitled to the benefit of the interim presumption.[19]

The BRB affirmed the ALJ's order denying benefits. It first noted that Ray's "contention that subsection (a)(1) must be invoked where the record contains a single positive X-ray has previously been considered and rejected,"[20] and it agreed with the ALJ's evaluation of the X-ray evidence and ventilatory studies. Finally, while disagreeing with some of the ALJ's reasoning, the Board reviewed and approved the ALJ's weighing of the physicians' opinions in the employer's favor.

The Court of Appeals remanded for further proceedings. It held that the interim presumption had been invoked under § (a)(2) by the two qualifying ventilatory studies and under § (a)(4) by the one qualifying physician's opinion. The court did not rely on the positive X-ray interpretation because it was not sufficiently identified to satisfy the requirements for X-ray evidence under § 718.102(c) of the Secretary's regulation. The court reversed the Board's denial of benefits and remanded for the ALJ to determine whether the presumption had been rebutted. We granted certiorari, 479 U. S. 1029 (1987), to resolve the question presented by this case: whether one item of qualifying evidence is always sufficient to invoke the interim presumption and thereby shift the burden of persuasion to the employer.

IV

The Court of Appeals held that "the interim presumption under § 727.203(a)(1), (2), or (3) is established when there is

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physician's opinion need only conclude that the claimant has a totally disabling respiratory or pulmonary impairment, and need not also determine whether that impairment was caused by exposure to coal dust.

[19] The ALJ also considered three blood gas studies offered under § (a)(3), but none achieved the values necessary to qualify as proof of an impairment in the transfer of oxygen from the lung alveoli to the blood. Ray has not challenged these findings.

[20] *Id.*, at 120a (citing *Bozick* v. *Consolidation Coal Co.*, 5 BLR 1–574 (Ben. Rev. Bd. 1983)).

credible evidence that a qualifying X-ray indicates the presence of pneumoconiosis, a single qualifying set of ventilatory studies indicates, pursuant to the regulatory standard, a chronic respiratory or pulmonary disease, or a single qualifying set of blood gas studies indicates, pursuant to the regulatory standard, an impairment in the transfer of oxygen from the lungs to the blood." 785 F. 2d, at 426. The principal basis for this holding was the court's view that the plain language of the regulation makes it clear that a single positive X ray necessarily invokes the presumption. In advancing that view, however, the court did not pause to consider the significance of the word "establishes" in § (a)(1). It read § (a)(1) as though it merely required a chest X ray that constitutes evidence of the presence of pneumoconiosis rather than one that actually "establishes" the presence of the disease.

The Secretary's regulations, however, recognize the difference between an X ray that tends to prove the presence of pneumoconiosis and one that can be said to establish it. Thus, in contrast to the use of the word "establishes" throughout § 727.203(a), the regulation defining the suitable quality of X-ray evidence refers to an X ray that "shall constitute evidence of the presence or absence of pneumoconiosis."[21] The Court of Appeals read § 203(a)(1) as though it merely required an X ray that "constitutes evidence of the presence of pneumoconiosis." Had that been the Secretary's intent, presumably he would have used that language as he did elsewhere to explain that meaning.

There is another reason why § (a)(1) cannot have been intended to refer to a single item of evidence. For the ordinary trier of fact—even an ALJ who has heard many black lung benefit cases—an X ray may well be meaningless unless it is interpreted by a qualified expert. What may be persuasive to the ALJ, then, is not just the X ray itself, but its in-

[21] Section 718.102(e) (1987) provides, in part:

"(e) No chest X-ray shall constitute evidence of the presence or absence of pneumoconiosis unless it is in substantial compliance with the requirements of this section and Appendix A . . . ."

terpretation by a specialist. And, of course, different experts may provide different readings of the same X ray. As Judge Posner has observed:

> "Under the regulation it is not the reading, but the X-ray, that establishes the presumption. If one doctor interprets an X-ray as positive for black-lung disease but 100 equally qualified doctors interpret the same X-ray as negative for the disease, nothing in the regulation requires the administrative law judge to disregard the negative readings." *Cook* v. *Director, Office of Workers' Compensation Programs*, 816 F. 2d 1182, 1185 (CA7 1987).

Thus, it seems perfectly clear that it is not the X ray in isolation that "establishes" the presence of the disease; rather, the regulation must, at a minimum, have reference both to the X ray itself and to other evidence that sheds light on the meaning and significance of the X ray.[22] Just as the ALJ must weigh conflicting interpretations of the same X ray in

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[22] The Court of Appeals' holding runs into trouble for § (a)(2) and § (a)(3) invocations as well. Those subsections refer to "ventilatory studies" and "blood gas studies"; facially, these plural references are not consistent with the Court of Appeals' reliance on the regulation's plain language. To finesse this problem, the Court of Appeals concluded that "one *set* of qualifying ventilatory or blood gas studies" necessarily invokes the presumption. 785 F. 2d, at 434 (emphasis added). It noted:

"[T]his interpretation is fully supported by the regulations which define how ventilatory and blood gas tests are to be conducted. These regulations demonstrate that each pulmonary function study consists of several tests and must be accompanied by two to three tracings of each test performed. 20 CFR §§ 718.103; 410.430. Similarly, a blood gas study may also have separate components, one reflecting the results obtained at rest, and the other reporting the results of testing during exercise. 20 CFR § 718.105." *Ibid.*

Nevertheless, this reasoning does rely upon adding the words "one set of" to the regulation; moreover, although ventilatory and blood gas studies do consist of a series of tests, the regulations on other occasions refer to such a series of tests as a single "study." See §§ 410.426(b) and 718.105(b) and (c).

order to determine whether it tends to prove or disprove the existence of pneumoconiosis, there would seem to be no reason why he must ignore all X rays in a series except one.[23]

The Court of Appeals relied in large part on perceived internal inconsistencies in the Secretary's interpretation. In the rebuttal section, the regulation provides that in "adjudicating a claim under this subpart, all relevant medical evidence shall be considered." The Court of Appeals interpreted this statement as requiring all relevant evidence to be considered on rebuttal. Since the Secretary's reading would make some evidence inadmissible for certain aspects of rebuttal,[24] the Court of Appeals thought that reading violated the requirement that "all relevant medical evidence shall be considered."

We disagree, for two reasons. First, nothing in the Secretary's position prevents "all relevant medical evidence" from being considered at some point during the proof process. To understand why this requirement was inserted at the beginning of the rebuttal section, it is important to understand its derivation. After the SSA adopted its interim presumption, its claims approval rate increased, in part due, it is thought, to factfinders failing to consider all of the employers' relevant medical evidence.[25] To assure that this problem would not infect adjudications under the new Labor interim presump-

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[23] The ALJ's task is, of course, to weigh the quality, and not just the quantity, of the evidence, before determining whether the presumption has been invoked. In Ray's case, despite the fact that nonqualifying X rays and ventilatory studies, for example, significantly outnumbered qualifying ones, the ALJ's opinion focuses not on number, but on the uncertainty of the most recent qualifying X-ray interpretation and the discounting of one of the qualifying ventilatory studies by the doctor who administered them.

[24] *E. g.*, negative X-ray interpretations that had already been outweighed by positive readings in establishing the existence of pneumoconiosis under § (a)(1) could not be used to show the absence of pneumoconiosis under § (b)(4). See n. 26, *infra*.

[25] See Solomons, A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of its Unresolved Issues, 83 W. Va. L. Rev. 869, 893–895 (1981) (Solomons).

tion, the requirement of 30 U. S. C. § 923(b) that all relevant medical evidence be considered in adjudicating SSA claims was explicitly carried over into the Labor presumption's rebuttal section. Thus, that the "all relevant medical evidence" requirement appears at the beginning of the rebuttal section reflects the genesis of the concern and does not indicate that the drafters intended a more limited evidentiary battle at the invocation stage. As long as relevant evidence will be considered at some point by the ALJ, the demand that the decision be made on the complete record is satisfied.

Second, the cited provision refers to "adjudicating a claim under this *subpart*," and a "subpart" "may be used to group related sections in a part." 1 CFR § 21.9(b) (1987). All of 20 CFR § 727.203 (1987), the interim presumption, is within *subpart* C of part 727. Thus, nothing in the regulation requires all relevant medical evidence to be considered at the rebuttal phase; such evidence must simply be admissible at some point during the proof process.

The Court of Appeals was persuaded as well that some of the rebuttal provisions would be superfluous under the Secretary's reading. For instance, if the claimant invokes the presumption by establishing the existence of pneumoconiosis under § (a)(1), the employer may not try to disprove pneumoconiosis under § (b)(4). This limitation on rebuttal, according to the Court of Appeals, renders the Secretary's position internally inconsistent.

Again, we are constrained to disagree. Nothing in the regulation *requires* each rebuttal subsection to be fully available in each case. As long as the employer can introduce, say, nonqualifying X rays at the invocation stage to oppose invocation under § (a)(1), it has been given the chance to show the nonexistence of pneumoconiosis. If the presumption is nonetheless invoked, the employer can still try to disprove total disability or causality.[26]

[26] Under the Secretary's reading, a fact established at the invocation stage *does* "remain open" to challenge on rebuttal, but "only to the extent there is relevant evidence different in kind from that offered at the pre-

Finally, there is some concern that the Secretary's position might permit a single negative X-ray interpretation to carry the day for the employer, in violation of the statute's mandate that "no claim for benefits . . . shall be denied solely on the basis of the results of [an X ray]." § 923(b) (made applicable to Part C adjudications through § 902(f)(2)). The easy answer was provided by the dissent below: "a single negative X-ray may not . . . be drawn upon either as the *sole* basis for finding the invocation burden under (a)(1) not carried nor as the *sole* basis for finding the rebuttal burden under (b)(4) carried." 785 F. 2d, at 445 (emphases added). Furthermore, in weighing conflicting X-ray readings ALJs will undoubtedly keep in mind the character of the black lung disease:

> "Since pneumoconiosis is a progressive and irreversible disease, early negative X-ray readings are not inconsistent with significantly later positive readings. . . . This proposition is not applicable where the factual pattern is reversed. In a situation . . . where the more recent X-ray evidence is negative and directly conflicting with

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sumption stage." Brief for Federal Respondent 25. So, under the Secretary's reading, if the claimant invokes the presumption through "other medical evidence" under § (a)(4), thus proving the ultimate fact of total disability, the employer not only may attempt to disprove causality under § (b)(3) or pneumoconiosis under § (b)(4), but also may try to disprove total disability under § (b)(1) or § (b)(2) through evidence that was not able to be introduced at the invocation stage. However, as the Government also notes:

"Based on current medical knowledge, X-ray, biopsy, and autopsy evidence are today the only reliable evidence for diagnosing pneumoconiosis. Therefore, after a Subsection (a)(1) invocation, the question of pneumoconiosis is effectively closed: the rebutting party cannot, as a practical matter, attempt to show that the miner does not suffer from some form of clinical pneumoconiosis." *Id.*, at 24, n. 22.

Invocation under § (a)(2) or § (a)(3), of course, involves proof of none of the three ultimate facts of pneumoconiosis, total disability, or coal mine relatedness; thus, under the Secretary's interpretation, after a § (a)(2) or § (a)(3) invocation, the employer may attempt to disprove any of the three ultimate facts, limited only by the general rule that its proof may not include evidence of the sort introduced (and outweighed) during invocation.

> earlier positive X-rays it may be weighed with less regard to timing in light of the recognized principle that negative X-ray readings are not a trustworthy indicator of the absence of the disease." *Elkins* v. *Beth-Elkhorn Corp.*, 2 BLR 1–683, 1–686 (Ben. Rev. Bd. 1979).

In sum, we find the Secretary's interpretation of his own regulation entirely consistent with its text.

V

The Court of Appeals' holding that a single item of qualifying evidence always suffices to carry a claimant's invocation burden was based in part on its understanding of the legislative history of the black lung benefits statutes. 785 F. 2d, at 457–461. This conclusion is based on the clear congressional mandate for interim presumptions to reduce the number of benefit denials by both the SSA and Labor. While we agree that Congress did intend to ensure fewer benefit denials, we are not persuaded either that that goal has been frustrated by the Secretary's interpretation of the regulation, or that Congress intended more specifically to require invocation of the presumption based solely on one item of a claimant's proof.

In the early years of the benefits program, the SSA denied a high number of claims because of a perceived lack of proof of totally disabling pneumoconiosis due to coal mine employment. Congress mandated liberalized standards, and the SSA established an interim presumption to carry out this directive. § 410.490(b). In so doing, the SSA explained the problems with the prior scheme and the virtues of the new one:

> "In enacting the Black Lung Act of 1972, the Congress noted that adjudication of the large backlog of claims generated by the earlier law could not await the establishment of facilities and development of medical tests not presently available to evaluate disability due to

pneumoconiosis, and that such claims must be handled under present circumstances in the light of limited medical resources and techniques. Accordingly, the Congress stated its expectancy that the Secretary would adopt such interim evidentiary rules and disability evaluation criteria as would permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of the 1972 amendments and that such rules and criteria would give full consideration to the combined employment handicap of disease and age and provide for the adjudication of claims on the basis of medical evidence other than physical performance tests when it is not feasible to provide such tests. The provisions of this section establish such interim evidentiary rules and criteria. They take full account of the congressional expectation that in many instances it is not feasible to require extensive pulmonary function testing to measure the total extent of an individual's breathing impairment, and that an impairment in the transfer of oxygen from the lung alveoli to cellular level can exist in an individual even though his chest roentgenogram (X-ray) or ventilatory function tests are normal." § 410.490(a).

The SSA implemented this congressional desire to ease claimants' proof burdens by promulgating the interim presumption that serves as the antecedent to the one at issue in this case. The presumption, applicable to claims filed with the SSA before July 1, 1973, provides that a miner is presumed to be totally disabled due to pneumoconiosis if two conditions are met: First, either "[a] chest . . . X-ray . . . establishes the existence of pneumoconiosis" or "[i]n the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease . . . ." § 410.490(b)(1); second, "[t]he impairment established in accordance with [either of these medical require-

ments] arose out of coal mine employment." § 410.490(b)(2). Additionally, "a miner who meets the [ventilatory studies] medical requirements . . . will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment . . . if he has at least 10 years of the requisite coal mine employment." § 410.490(b)(3).

The SSA's interim rules further provide that the presumption can be rebutted if either "[t]here is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work" or "[o]ther evidence, including physical performance tests . . . , establish[es] that the individual is able to do his usual coal mine work or comparable and gainful work." § 410.490(c).

As the SSA's claims approval rate increased, Labor's remained low, in large part because of the absence of an interim presumption by which a claimant would only have to prove one predicate fact. The interim presumption at issue in this case, promulgated as a result of congressional dissatisfaction with Labor's low claims approval rate, is substantially similar to the SSA interim presumption. It satisfies Congress' demand that Labor's criteria "shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973," 30 U. S. C. § 902(f)(2), *i. e.*, no more restrictive than the SSA's interim presumption.

Since Labor's interim presumption derived so directly from the SSA's, if the Court of Appeals' conclusion regarding single-item invocation were correct, one would expect to find SSA ALJ decisions permitting invocation in such a manner, and federal court opinions indicating approval. Instead, federal court decisions routinely referred to SSA ALJ invocation weighings without objection, and often with explicit approval.[27] Thus,

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[27] See, *e. g.*, *Padavich* v. *Mathews*, 561 F. 2d 142, 145–146 (CA8 1977) (medical evidence "contradictory and inconclusive"; first set of X rays negative, second set first interpreted positive, then negative by different radiologists); *Bozwich* v. *Mathews*, 558 F. 2d 475 (CA8 1977) (conflicting X-ray readings; interim presumption not invoked); *Collins* v. *Mathews*, 547 F. 2d

the legislative history of the Labor interim presumption does not establish that invocation must occur on a single piece of qualifying evidence.[28]

795, 796 (CA4 1976) ("Although there were conflicting interpretations of [the] X-rays, the [ALJ] determined the deceased coal miner had simple pneumoconiosis"); *Petrock* v. *Califano*, 444 F. Supp. 872, 875 (ED Pa. 1977); *Owens* v. *Mathews*, 435 F. Supp. 200, 206 (ND Ind. 1977); *Hill* v. *Weinberger*, 430 F. Supp. 332, 334 (ED Tenn. 1976) ("[T]he Appeals Council stated . . . that it considers the interpretive opinions of all film readers, and bases its judgment with respect to a particular X-ray upon the credibility of the film readers . . ."); *Padavich* v. *Mathews*, 416 F. Supp. 1229, 1231 (SD Iowa 1976), aff'd, 561 F. 2d 142 (CA8 1977); *Ward* v. *Mathews*, 403 F. Supp. 95, 98 (ED Tenn. 1975); *Zirkle* v. *Weinberger*, 401 F. Supp. 945, 949 (ND W. Va. 1975); *Blackmon* v. *Weinberger*, 400 F. Supp. 1282, 1287 (ED Okla. 1975); *Baker* v. *Secretary of Health, Education, and Welfare*, 383 F. Supp. 1095, 1099 (WD Va. 1974).

Since the promulgation of the Labor interim presumption, the Courts of Appeals have been nearly as uniform in sanctioning invocation weighing under the SSA interim presumption. See, *e. g.*, *Hamrick* v. *Schweiker*, 679 F. 2d 1078, 1081 (CA4 1982); *Prater* v. *Harris*, 620 F. 2d 1074, 1084 (CA4 1980); *Pannell* v. *Califano*, 614 F. 2d 391, 393 (CA4 1980); *Staten* v. *Califano*, 598 F. 2d 328, 330 (CA4 1979); *Vintson* v. *Califano*, 592 F. 2d 1353, 1360 (CA5 1979); *Sharpless* v. *Califano*, 585 F. 2d 664, 667 (CA4 1978); *Gober* v. *Matthews*, 574 F. 2d 772, 775 (CA3 1978).

The Sixth Circuit stands alone in its view that if a claimant's first X-ray reading is positive, it necessarily invokes the presumption and may not be reread or contradicted by later readings or X rays, but that "when positive readings are contradicted by *prior* negative X-rays, there is substantial evidence to support a finding by the Secretary that the evidence is in conflict and the Secretary may have the positive X-rays reread in order to determine whether a claimant is disabled due to pneumoconiosis." *Couch* v. *Secretary of Health and Human Services*, 774 F. 2d 163, 168 (1985) (emphasis added); see also *Hatfield* v. *Secretary of Health and Human Services*, 743 F. 2d 1150 (1984); *Haywood* v. *Secretary of Health and Human Services*, 699 F. 2d 277 (1983); *Lawson* v. *Secretary of Health and Human Services*, 688 F. 2d 436 (1982); *Miniard* v. *Califano*, 618 F. 2d 405 (1980); *Dickson* v. *Califano*, 590 F. 2d 616 (1978).

[28] The Court of Appeals also relied upon evidence that an early draft of the regulation contained a provision that "would have required the adjudicator to weigh all the medical test evidence to determine whether the weight of this evidence established total disability." See Solomons 897,

VI

Under either the Court of Appeals' or the Secretary's interpretation of the regulation, a single item of qualifying evidence *may* be sufficient to invoke the presumption. Indeed, the authors of the regulation apparently expected that the presumption would regularly be invoked on the basis of a single item of qualifying evidence.[29] Reasoning from that

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n. 138. This provision was eliminated in response to objections raised by congressional staff members. The Court of Appeals concluded that this history demonstrates that the final draft of the regulation was not intended to require the weighing of any evidence before the presumption may be invoked. See 785 F. 2d, at 451–452, and n. 5. We are not persuaded. First, the regulation quite plainly does not require proof of total disability in order to invoke the presumption under §§ (a)(1), (a)(2), or (a)(3). Second, the rejected provision would have required, in determining total disability, a weighing of "*all* the medical *test* evidence"—*i. e.*, X rays, ventilatory studies, and blood gas studies. This *method* of invocation appears simply to have been scrapped in favor of permitting a claimant to meet *one* of the enumerated medical requirements.

[29] In responding to comments received after the notice of proposed rulemaking urging that all relevant evidence *not* be considered in rebutting the interim presumption, the Secretary stressed the statutory mandate requiring the evaluation of all relevant evidence. He explained:

"[T]he Department cannot, as has been requested by some, look for the single item of evidence which would qualify a claimant on the basis of the interim presumption, and ignore other previously obtained evidence. This does not mean that the single item of evidence which establishes the presumption is overcome by a single item of evidence which rebuts the presumption. The Act embodies the principle that doubt is to be resolved in favor of the claimant, and that principle plays an important role in claims determinations both under the interim presumption and otherwise." 43 Fed. Reg. 36826 (1978).

The Court of Appeals interpreted this statement as "clearly imply[ing] that it was intended that one item of qualifying evidence would be sufficient to invoke the presumption." 785 F. 2d, at 465. That is, the Court of Appeals read "the single item of evidence which would qualify a claimant on the basis of the interim presumption" and "the single item of evidence which establishes the presumption" as referring to a separate, unspoken,

expectation, the Court of Appeals concluded that the presumption *must* be invoked whenever the record contains a single item of qualifying evidence. But as we have demonstrated above, that conclusion is compelled by neither the text nor the history of the regulation.

Nor is it compelled by the underlying basis for the presumption. For black lung benefits presumptions, no less than any presumption established or recognized in law, are the product of both factual understandings and policy concerns. As a matter of fact, Congress could reasonably have concluded that it is highly probable that a person who engaged in coal mine employment for over a decade is totally disabled as a result of pneumoconiosis arising from that employment if he or she can prove any of the medical requirements specified in the regulation.[30] That degree of probabil-

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and uncontroverted proposition that a single item of qualifying evidence *necessarily* satisfies the claimant's invocation burden. *Ibid.*

While this reading is plausible, we think it ultimately unsatisfactory. According to the Secretary, the first sentence of his explanation merely proscribes Labor from making "the presumption irrebuttable by singling out certain positive evidence and overlooking other relevant evidence." Brief for Federal Respondent 38. This reading focuses on the phrase "the Department cannot . . . look for"; rather than operating as a referent to an assumed invocation phase principle, the "single item of evidence . . ." phrase instead names the thing that Labor may not do, viz., pick and choose among the items of evidence in adjudicating a miner's claim. Thus, the second sentence of the explanation merely recognizes that in some cases the presumption *may* be invoked by a single item of evidence and that in such cases a single item of equally probative contrary evidence will not be sufficient to rebut the presumption.

[30] Like all rules of evidence that permit the inference of an ultimate fact from a predicate one, black lung benefits presumptions rest on a judgment that the relationship between the ultimate and the predicate facts has a basis in the logic of common understanding.

"Inferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime—that is, an 'ultimate' or 'elemental' fact—from the existence of one or more 'evidentiary' or 'basic'

ity is not, however, present when the claimant is merely in a position to offer a single item of qualifying evidence that is overcome by more reliable conflicting evidence.

As a matter of policy, Congress was aware that it is difficult for coal miners whose health has been impaired by the insidious effects of their work environment to prove that their diseases are totally disabling and coal mine related, or that those diseases are in fact pneumoconiosis. Rather than merely providing a benefit for those miners who could prove each of the relevant facts by a preponderance of the evidence, Congress intended that those long-term miners who can show that they are truly diseased should have to prove no more.[31] But if a miner is not actually suffering from the type of ailment with which Congress was concerned, there is no justification for presuming that that miner is entitled to benefits. For not only does that miner fall outside the class of those who need the assistance of an interim presumption, but he also is unlikely to be totally disabled from coal mine employment. By requiring miners to show that they suffer from the sort of medical impairment that initially gave rise to congressional concern, and then by requiring employers to shoulder the remainder of the proof burden, the Secretary's

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facts . . . . The value of these evidentiary devices, and their validity under the Due Process Clause, vary from case to case, however, depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently." *Ulster County Court* v. *Allen*, 442 U. S. 140, 156 (1979).

[31] The statute itself, of course, requires certain presumptions for pre-July 1, 1973, SSA claims. For example, the statute presumes a miner's pneumoconiosis to have arisen out of coal mine employment if he has worked for 10 or more years in one or more coal mines. 30 U. S. C. § 921(c)(1); see also §§ 921(c)(2), (3), and (4) (other SSA claim presumptions). Since Labor's interim presumption may be no less restrictive than the SSA's, these § 921(c) presumptions apply indirectly to Labor claims as well.

reading of the interim presumption's invocation burden satisfies both the purposes of the statute and the need for a logical connection between the proven fact and the presumed conclusion.[32]

In the end, the Secretary's view is not only eminently reasonable but also is strongly supported by the fact that Labor wrote the regulation. The agency's interpretation, which is deserving of substantial deference "unless it is plainly erroneous or inconsistent with the regulation," *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 414 (1945), has been, with one exception, consistently maintained through Board decisions.[33] Likewise, prior to the Court of Appeals decision in this case, the Courts of Appeals had routinely reviewed for substantial evidence the factfinder's invocation determination under a preponderance-of-the-evidence standard.[34] Accord-

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[32] Lurking beneath the surface of this case is the constitutional concern that there be "some rational connection between the fact proved and the ultimate fact presumed." *Mobile, J. & K. C. R. Co.* v. *Turnipseed*, 219 U. S. 35, 43 (1910). There is some question whether pneumoconiosis, for example, can be considered "proved"—and therefore serve as the constitutional predicate for presuming ultimate facts—if evidence tending to disprove pneumoconiosis is not permitted to be considered at invocation. See *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 28–29 (1976) (statutory presumption of causation, 30 U. S. C. § 921(c)(1), is triggered only on "proof of pneumoconiosis" plus 10 years' employment).

[33] See, *e. g.*, *Elkins* v. *Beth-Elkhorn Corp.*, 2 BLR 1–683, 1–686—1–687 (Ben. Rev. Bd. 1979) (approving weighing of X-ray evidence under § (a)(1)); *Strako* v. *Zeigler Coal Co.*, 3 BLR 1–136, 1–143 (Ben. Rev. Bd. 1981) (factfinder "must weigh conforming qualifying test reports with conforming nonqualifying test reports, and he must resolve the conflict," under § (a)(2)); *Lessar* v. *C. F. & I. Steel Corp.*, 3 BLR, at 1–68 (requiring weighing of § (a)(3) evidence); *Meadows* v. *Westmoreland Coal Co.*, 6 BLR 1–773, 1–779 (Ben. Rev. Bd. 1984) (approving weighing of conflicting medical reports under § (a)(4)), overruling *Stiner* v. *Bethlehem Mines Corp.*, 3 BLR 1–487, 1–490 (Ben. Rev. Bd. 1981) (requiring invocation on basis of one qualifying medical opinion).

[34] See, *e. g.*, *Moseley* v. *Peabody Coal Co.*, 769 F. 2d 357, 359–360, and n. 3 (CA6 1985) (approving ALJ's weighing of X-ray interpretations before

ingly, there is no reason to downgrade the normal deference accorded to an agency's interpretation of its own regulation. Cf. *Motor Vehicle Mfrs. Assn. of the United States, Inc.* v. *State Farm Mutual Automobile Insurance Co.*, 463 U. S. 29 (1983).

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holding presumption invoked under § (a)(1)); *Consolidation Coal Co.* v. *Chubb*, 741 F. 2d, at 973 (approving ALJ's "according greater weight to the recent X-ray"); *Drummond Coal Co.* v. *Freeman*, 733 F. 2d 1523 (CA11 1984) (not objecting to ALJ's invocation after weighing evidence under §§ (a)(1), (2), and (4)); *Whicker* v. *United States Dept. of Labor Benefits Review Bd.*, 733 F. 2d 346 (CA4 1984) (sanctioning § (a)(1) weighing), overruled, *Stapleton* v. *Westmoreland Coal Co.*, 785 F. 2d 424 (CA4 1986); *Consolidation Coal Co.* v. *Sanati*, 713 F. 2d 480 (CA4 1983) (requiring weighing of physicians' opinions under § (a)(4)), overruled in part, *Stapleton* v. *Westmoreland Coal Co.*, *supra*; *Markus* v. *Old Ben Coal Co.*, 712 F. 2d 322, 324 (CA7 1983) (approving ALJ's accepting more recent negative X-ray interpretations over older positive ones).

After the Court of Appeals decision in this case, the Courts of Appeals have adopted divergent views on the issue presented. The Third Circuit is the only one to have plainly sided with the Fourth. *Revak* v. *National Mines Corp.*, 808 F. 2d 996 (1986). With some intracircuit confusion, the Sixth and Seventh Circuits have followed the Secretary's interpretation. *Prater* v. *Hite Preparation Co.*, 829 F. 2d 1363 (CA6 1987) (preponderance standard for §§ (a)(1), (2), and (3) invocations); *Patton* v. *National Mines Corp.*, 825 F. 2d 1035 (CA6 1987) (remand to Board to determine whether preponderance standard is correct for § (a)(4) invocations); *Back* v. *Director, Office of Workers' Compensation Programs*, 796 F. 2d 169 (CA6 1986) (preponderance standard for § (a)(1) invocations); *Engle* v. *Director, Office of Workers' Compensation Programs*, 792 F. 2d 63, 64, n. 1 (CA6 1986) ("The miner has the burden of establishing by a preponderance of the evidence all the facts necessary to invoke the interim presumption of 20 CFR § 727.203(a) . . ."); *Cook* v. *Director, Office of Workers' Compensation Programs*, 816 F. 2d 1182 (CA7 1987) (preponderance standard for § (a)(1) invocations) (*Amax Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 801 F. 2d 958 (CA7 1986), and *Kuehner* v. *Ziegler Coal Co.*, 788 F. 2d 439 (CA7 1986), distinguished on ground that they merely held that invocation is *permitted* by one item of evidence; dissenting judge finds prior cases indistinguishable). The Tenth Circuit, without discussing the issue, simply approved an X-ray weighing that resulted in noninvocation. *Plutt* v. *Benefits Review Bd., Dept. of Labor*, 804 F. 2d 597 (1987).

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.[35]

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

This case concerns the evidentiary threshold that a claimant of black lung benefits must meet to invoke the interim presumption of total disability due to pneumoconiosis under 20 CFR § 727.203(a) (1987). The Director of the Office of Workers' Compensation (Director) interprets the regulation to require that a claimant prove by a preponderance of the evidence one of the four medical requirements listed in § 727.203(a) to trigger the presumption. The Court of Appeals, en banc, rejected the Director's proffered interpretation and held that the presumption is invoked once the claimant has presented a single item of evidence meeting one of the medical requirements—that is, "one positive x-ray, one qualifying set of ventilatory or blood gas studies, or one physician's opinion." *Stapleton* v. *Westmoreland Coal Co.*, 785 F. 2d 424, 436 (CA4 1986). The Court chooses to embrace the Director's view. Because I believe that the Director's interpretation of the regulation contravenes its plain language and creates a regulatory scheme that is unnecessarily complex and internally inconsistent, I dissent.

I

The language and structure of the regulation provide the most compelling evidence for rejecting the Director's interpretation. The regulation sets up two evidentiary stages:

[35] Because we agree with petitioners that the regulation itself requires a claimant to prove an invocation fact by a preponderance of the evidence, we need not pass on petitioners' alternative argument, namely, that § 7(c) of the Administrative Procedure Act, 5 U. S. C. § 556(d), requires a claimant to prove an invocation fact by a preponderance of the evidence.

part (a), the presumption-invocation stage, and part (b), the rebuttal stage. Part (a) provides that a "miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis" as long as the miner meets any one of four medical requirements. § 727.203(a). Part (b) provides that the presumption is rebutted if the Administrative Law Judge (ALJ) determines that the claimant is doing or could do his usual coal mine work or comparable gainful work; that the disability "did not arise in whole or in part out of coal mine employment"; or that the "evidence establishes that the miner does not, or did not, have pneumoconiosis." § 727.203(b).

Under § (a)(1), the presumption is triggered when "[a] chest [X ray], biopsy, or autopsy establishes the existence of pneumoconiosis." Under § (a)(4), the presumption is triggered when "[o]ther medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment." The regulation does not refer to "the X-ray evidence taken as a whole," or "the weight of documented opinions of physicians"—the inquiry mandated by the Court's interpretation—but rather to *an* X ray, or *a* physician's opinion. Moreover, the regulation does not provide that a claimant who presents a single qualifying piece of evidence *may* be presumed to be totally disabled because of pneumoconiosis, but rather provides that such a claimant "*will* be presumed" totally disabled because of the disease. The regulation thus expressly commands that a single qualifying X ray or a single documented physician's opinion will trigger the presumption.[1]

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[1] With respect to the medical requirements under §§ 727.203(a)(2) and (a)(3), the regulation uses the plural, referring to "ventilatory studies" and "blood gas studies." The use of the plural, however, only reflects the fact that a qualifying ventilatory and blood gas test consists of a set of many studies. See 20 CFR §§ 718.103, 718.105 (1987). As with § (a)(1) and § (a)(4), the presumption is triggered when a claimant presents a single set

The Court attempts to evade the plain meaning of the regulation by placing overriding emphasis on the regulation's use of the word "establishes." The Court interprets "establish" to mean that a claimant must prove each of the medical requirements by a preponderance of the evidence.[2] Under this interpretation, an ALJ must weigh conflicting like-kind evidence before invoking the presumption. A more natural reading of "establish" in the context of the presumption-invocation stage, however, is simply that the ALJ must determine whether a claimant has come forward with an X ray, a set of ventilatory or blood gas studies, or a physician's opinion that meets the requirements and standards of the regulation. In other words, an ALJ determines whether the single item of evidence "establishes the existence of pneumoconiosis" or "establishes the presence of a totally disabling respiratory or pulmonary impairment" by referring to the strict reliability and authenticity requirements of the regulations, see, *e. g.*, 20 CFR §§ 410.428, 727.206 (1987), and, with regard to ventilatory and blood gas studies, to the qualifying standards set out in § 727.203(a).

The Court argues that § (a)(1) cannot have been intended to refer to a single item of evidence because an X ray is probative only when it is interpreted by a qualified expert. The Court reasons that because the presumption is invoked by an X ray, and not by an expert's reading, an ALJ may have to consider different interpretations of the same X ray. From this premise, the Court concludes that "[j]ust as the ALJ must weigh conflicting interpretations of the same X ray . . . , there would seem to be no reason why he must ignore

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of ventilatory or blood gas studies that meet the qualifying standards set out in part (a).

[2] Both the Director and the Court state that the agency has "long adhered to the 'true doubt' rule, which requires that the claimant prevail on those issues as to which the evidence is in equipoise." Brief for Federal Respondent 16–17 (citation omitted). The Director has failed to bring to our attention, however, one instance in which the true-doubt rule actually has been applied by an ALJ in evaluating a miner's claim.

all X rays in a series except one." *Ante*, at 148–149 (footnote omitted). No reason except the regulatory language. Whatever the merit of the Court's conclusion that conflicting readings of the same X ray must be weighed prior to invoking the presumption (for that question is not before the Court), the regulation's plain language requires that the presumption be invoked when a single X ray is read only as positive. In addition, contrary to the Court's characterization, additional X rays that indicate the absence of pneumoconiosis are not "ignored"; they are fully considered by the ALJ during the rebuttal stage, when all evidence against the presumed existence of pneumoconiosis is brought to bear.[3]

The Court of Appeals ruling that a single qualifying test or medical opinion is sufficient to invoke the presumption is further supported by the comments that the Secretary of Labor issued in connection with the final promulgation of the regulations. In addressing the standard of rebuttal, the Secretary stated:

[3] The Court also argues that the Court of Appeals reads the invocation section "as though it merely required an X ray that 'constitutes evidence of the presence of pneumoconiosis,'" and asserts that "[h]ad that been the Secretary's intent, presumably he would have used that language as he did elsewhere to explain that meaning." *Ante*, at 147. The Court notes that § 718.102(e), a regulation defining standards required of X rays, refers to an X ray "that shall constitute evidence of the presence or absence of pneumoconiosis." This argument arises from the Court's unwillingness to recognize that the meaning of "establish" is informed by the requirements of the presumption-invocation stage. The Court is correct that in context of the presumption-invocation stage, a single item of evidence that "constitutes evidence of pneumoconiosis" will also "establish the existence of pneumoconiosis." Given that the inquiry at the invocation stage is whether a single item of evidence is qualifying, the functional equivalence of these two terms is to be expected. As for the regulation cited by the Court defining X-ray standards, it guides the evaluation of all claims for black lung benefits, not just claims that fall under the interim regulations. That these standards speak of X rays that "constitute evidence of pneumoconiosis," rather than X rays that "establish the existence of pneumoconiosis," says nothing about whether these two terms have identical meanings in the context of the presumption-invocation stage.

> "[T]he Department cannot, as has been requested by some, look for the single item of evidence which would qualify a claimant on the basis of the interim presumption, and ignore other previously obtained evidence. This does not mean that *the single item of evidence which establishes the presumption* is overcome by a single item of evidence which rebuts the presumption." Notice of Final Rulemaking under the Black Lung Benefits Reform Act of 1977, 43 Fed. Reg. 36826 (1978) (hereinafter Notice of Rulemaking) (emphasis added).

The Director's current position conflicts with this strong evidence of regulatory intent.

Another compelling reason to reject the Director's interpretation is that it conflicts with the requirement in part (b), the rebuttal section, that in "adjudicating a claim under this subpart, all relevant medical evidence shall be considered." § 727.203(b). The Director's interpretation turns the regulation on its head, requiring that all relevant medical evidence be submitted and weighed at the invocation stage, but severely restricting the consideration of medical evidence during the rebuttal stage. In the Director's view, the presumption is triggered only when the weight of evidence in one of the categories of medical evidence in part (a) proves the fact specified in that category. For instance, the "fact proved" under § (a)(1) is the existence of pneumoconiosis, and under § (a)(4) it is the presence of a totally disabling respiratory or pulmonary impairment. Because these facts have been proved in the invocation stage, relitigation in the rebuttal stage through like-kind evidence is foreclosed. Brief for Federal Respondent 14–15. Of course, nonmedical evidence could be presented in these instances, but this hardly conforms to the mandate that "all relevant medical evidence" be considered in the rebuttal stage.

The Court argues that the placement of the "all relevant medical evidence" requirement was inexact, and that the regulation requires only that all relevant medical evidence be

considered at some point in the evaluation of a claim, whether it be during the invocation or rebuttal stage. Yet if the Secretary intended that the "all relevant medical evidence" language apply to both stages of the evaluation process, it is remarkable that he placed the language in the introduction to the rebuttal section. It would have been a simple matter, if such were the Secretary's intent, to place the "all relevant medical evidence" language at the beginning of § 727.200. I see no reason to assume such inartful drafting. Moreover, comments by the Secretary accompanying the final promulgation of the regulations conflict with the Court's interpretation. The Secretary stated: "The many comments which urge that all relevant evidence should not be considered *in rebutting the interim presumption* must also be rejected. . . . [T]he Social Security regulations . . . similarly do not limit the evidence which can be considered *in rebutting the interim presumption.*" Notice of Rulemaking 36826 (emphasis added). These comments demonstrate that the Secretary understood the language to apply directly to the rebuttal section.

In addition, the Director's approach renders virtually useless one of four grounds for rebuttal in part (b). Under § (b)(4), eligibility for benefits is rebutted if all relevant medical evidence establishes that the miner does not have pneumoconiosis. Yet in the Director's view all relevant medical evidence has already been considered at the presumption-invocation stage. It is only when the evidence presented during the invocation stage is mismatched, as for example when the claimant produces qualifying blood-gas-studies evidence and the mine operator produces negative X rays, that the presumption may be triggered and rebuttal evidence under § (b)(4) is available that has not already been weighed. Moreover, as the Director acknowledges, if a claimant invokes the presumption under § (a)(1) by a preponderance of X-ray, biopsy, or autopsy evidence, as a practical matter there is no further evidence that the coal mine operator could submit to rebut the presumed existence of pneumoconiosis

because such § (a)(1) evidence is the most reliable method of diagnosing the disease. See Brief for Federal Respondent 24, n. 22. The Court counters that "[n]othing in the regulation *requires* each rebuttal subsection to be fully available in each case." *Ante*, at 150. This is of course true. Yet it is extraordinary that the regulation would intend to make the rebuttal stage an often useless exercise with respect to the central aspect of a valid claim: whether a miner suffers from pneumoconiosis.

II

In addition to running afoul of the regulatory language and structure, the Director's reading of the regulation creates a needlessly complex regulatory scheme that blurs the distinction between the presumption-invocation and rebuttal stages. Under the Director's interpretation, when the weight of evidence in one of the medical-evidence categories invokes the presumption, then the same evidence cannot be considered during rebuttal to challenge the existence of the fact proved, but it may be considered if relevant to rebut one of the presumed elements of a valid claim for benefits. The Director's approach subjects the ALJ to a mesmerizing swirl of evidentiary rules. If the presumption is invoked under § (a)(1), then X-ray evidence may not be considered regarding the existence of pneumoconiosis, but may be considered, if relevant, on the issues whether the miner is totally disabled or whether the disease arose from coal mine employment. Similarly, if the presumption is invoked under § (a)(4), then medical evidence, including physicians' opinions, may not be considered on the issue of total disability, although it may be considered on the issues of the existence of pneumoconiosis and causation by coal mine employment. Finally, if the presumption is invoked using blood gas and ventilatory studies evidence under § (a)(2) and § (a)(3), the same evidence may be considered again regarding each rebuttal category, because the proved facts are not elements of a valid claim for benefits. The Director's interpretation thus

creates a procedural morass that could not have been intended by the regulation's two-step inquiry.

By contrast, the Court of Appeals interpretation is marked by its simplicity. Under this approach the ALJ first determines whether the claimant has come forward with a qualifying medical test or physician's opinion and, if so, proceeds to the rebuttal stage. At this point all relevant evidence must be considered, and the mine operators may rebut the presumed existence of pneumoconiosis, total disability, and causation by coal mine employment on the basis of all the grounds provided by § 727.203(b).

III

The Court's willingness to accept the Director's interpretation of the regulation is based, I believe, on a misperception of the problem Congress and the Department of Labor were trying to alleviate with the interim presumption. Pneumoconiosis is an elusive and progressive disease. Congress was deeply concerned about the difficulty of diagnosing pneumoconiosis and the dearth of medical-testing facilities available to miners. Testimony before congressional committees and by Members of Congress repeatedly emphasized the unreliability of negative test results. As this Court stated in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 31–32, and n. 33 (1976), "Congress was presented with significant evidence demonstrating that X-ray testing that fails to disclose pneumoconiosis cannot be depended upon as a trustworthy indicator of the absence of the disease," whereas there was no "authoritative indications that X-ray evidence of the *presence* of pneumoconiosis is untrustworthy."[4] Juxtaposed with the difficulties in diagnosing pneumoconiosis was evi-

[4] For example, a study cited in a Senate Report found that "approximately 25 percent of a random sample of some 200 coal miners whose medical records based upon X-ray findings showed no coalworker's pneumoconiosis were found on post mortem examination to have the disease." S. Rep. No. 92–743, p. 12 (1972).

dence that the disease was rife among long-term coal miners. Congressman Paul Simon noted one study that found that autopsies of 400 coal miners with more than 20 years' experience showed that 90–95% of them had pneumoconiosis. House Committee on Education and Labor, Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977, 96th Cong., 282–283 (Comm. Print 1979). Testimony before the Senate estimated that as many as 50% of all coal miners will eventually become disabled from pneumoconiosis. See Hearings on S. 355 et al. before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 91st Cong., 1st Sess., pt. 2, pp. 641, 856 (1969) (statements of Dr. I. E. Buff and Dr. Leon Cander).

The Court recognizes that Congress was especially concerned with the difficulties miners face in showing they suffer from pneumoconiosis. The Court reasons, however, that "Congress intended that those long-term miners who can show that they are truly diseased should have to prove no more. But if a miner is not actually suffering from the type of ailment with which Congress was concerned, there is no justification for presuming that that miner is entitled to benefits." *Ante*, at 158 (footnote omitted). Yet it is the difficulty in showing whether a miner is "truly diseased" that Congress found so troubling. No one disputes that the case file of a miner suffering from pneumoconiosis may include negative X rays, negative ventilatory studies, negative blood gas studies, and negative opinions by physicians. The interim presumption was designed to shift some of the risk of faulty test results from the miner to the employer. The evidence of high incidence of pneumoconiosis among long-term coal miners, coupled with the difficulties encountered in diagnosing the disease, gave the Department of Labor good reason for shifting this burden by presuming total disability due to pneumoconiosis based on findings of a single positive medical test or physician's opinion. The Director's current

interpretation, which the Court today accepts, undermines that policy decision.

IV

The Court is correct that the agency's interpretation of its own regulations is entitled to deference. See, *e. g.*, *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 414 (1945). But deference has its bounds. It is not a license for an agency effectively to rewrite a regulation through interpretation. An agency must abide by its regulations as written until it rescinds or amends them. See *United States* v. *Nixon*, 418 U. S. 683, 695–696 (1974). The Director's interpretation of the interim presumption is contrary to the plain language of the regulation, conflicts with comments of the Secretary accompanying the final promulgation of the regulation, and creates an unnecessarily complex regulatory scheme. Because I view the agency's interpretation as plainly inconsistent with the regulatory language and history, I would not defer.

I accordingly dissent, and would affirm the judgment of the Court of Appeals.

Counsel Listing

HARTIGAN, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, ET AL. *v.* ZBARAZ ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 85–673. Argued November 3, 1987—Decided December 14, 1987

763 F. 2d 1532, affirmed by an equally divided Court.

Michael J. Hayes, First Assistant Attorney General of Illinois, argued the cause for appellants. With him on the briefs for appellant Hartigan were *Neil F. Hartigan*, Attorney General, *pro se*, *Roma Jones Stewart*, former Solicitor General, *Shawn W. Denney*, Solicitor General, and *Rita M. Novak*, Assistant Attorney General.

Colleen K. Connell argued the cause for appellees. With her on the briefs were *Marc O. Beem* and *Harvey Grossman*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Nevada by *Brian McKay*, Attorney General, and *Ellen F. Whittemore*, Deputy Attorney General; for the State of Ohio et al. by *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *David J. Kovach*, Assistant Attorney General, *Robert K. Corbin*, Attorney General of Arizona, *Linley E. Pearson*, Attorney General of Indiana, *Hubert H. Humphrey III*, Attorney General of Minnesota, *William L. Webster*, Attorney General of Missouri, and *David R. Wilkinson*, Attorney General of Utah; for Americans United for Life Legal Defense Fund by *Dennis J. Horan*, *Edward R. Grant*, *Maura K. Quinlan*, *Clarke D. Forsythe*, and *Ann-Louise Lohr;* for the Catholic League for Religious and Civil Rights by *Steven Frederick McDowell;* for the Family Research Council et al. by *Lynn D. Wardle;* and for the United States Catholic Conference by *John A. Liekweg* and *Mark E. Chopko*.

Briefs of *amici curiae* urging affirmance were filed for the American College of Obstetricians and Gynecologists et al. by *Benjamin W. Heineman, Jr.*, *Carter G. Phillips*, *Ann E. Allen*, *Stephan E. Lawton*, and *Laurie R. Rockett;* for the American Psychological Association by *Donald N. Bersoff* and *David W. Ogden;* for the American Public Health Association et al. by *Patricia Hennessey* and *Dara Klassel;* for the Judicial Consent for Minors Lawyer Referral Panel et al. by *Jamie Ann Sabino;* for the

PER CURIAM.

The judgment below is affirmed by an equally divided Court.

National Abortion Rights Action League et al. by *Rhonda Copelon*, *Anne E. Simon*, *Nadine Taub*, and *Kathryn Kolbert;* and for Pregnant Minors Desiring Confidential Abortions in Minnesota and Massachusetts et al. by *Janet Benshoof*, *Lynn M. Paltrow*, *Rachael N. Pine*, *William Z. Pentelovitch*, and *John H. Henn*.

Briefs of *amici curiae* were filed for the American Life League, Inc., by *Thomas Patrick Monaghan;* for American Victims of Abortion by *James Bopp, Jr.;* and for Concerned Women for America by *Charles F. Simon* and *Jordan W. Lorence*.

VERMONT *v.* COX

CERTIORARI TO THE SUPREME COURT OF VERMONT

No. 86-1108. Argued November 3, 1987—Decided December 14, 1987

Certiorari dismissed. Reported below: 147 Vt. 421, 519 A. 2d 1144.

Susan R. Harritt, Assistant Attorney General of Vermont, argued the cause for petitioner. With her on the briefs were *Jeffrey L. Amestoy*, Attorney General, and *Joanna A. Mauer*, Assistant Attorney General.

Paul J. Larkin, Jr., argued the cause for the United States as *amicus curiae* in support of petitioner. On the brief were *Solicitor General Fried, Assistant Attorney General Weld, Deputy Solicitor General Bryson, Harriet S. Shapiro*, and *Kathleen A. Felton*.

Henry Hinton, by invitation of the Court, 481 U. S. 1012, argued the cause as *amicus curiae* in support of the judgment below. With him on the brief was *William A. Nelson*.

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

THOMPSON *v.* THOMPSON, AKA CLAY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 86-964. Argued October 6, 1987—Decided January 12, 1988

Under the Parental Kidnaping Prevention Act of 1980 (PKPA or Act), States are required to afford full faith and credit to valid child custody determinations entered by a sister State's courts. When a California state court's award of joint custody to respondent and petitioner over their son became infeasible because of respondent's decision to move to Louisiana, the court granted respondent sole custody pending an investigator's report, whereupon the court intended to make a more studied custody determination. After respondent obtained a Louisiana court order enforcing the California decree and awarding her sole custody, the California court, having received and reviewed the investigator's report, entered an order granting sole custody to petitioner. Without first attempting to enforce the California decree in Louisiana, petitioner filed suit in Federal District Court seeking an order declaring the Louisiana decree invalid and the California decree valid, and enjoining the enforcement of the Louisiana decree. The court dismissed the complaint and the Court of Appeals affirmed on the ground that petitioner had failed to state a claim upon which relief could be granted.

Held: The PKPA does not provide an implied cause of action in federal court to determine which of two conflicting state custody decisions is valid. The context in which the PKPA was enacted—the existence of jurisdictional deadlocks among the States in custody cases and a nationwide problem of interstate parental kidnaping—suggests that Congress' principal aim was to extend the requirements of the Full Faith and Credit Clause to custody determinations, and not to create an entirely new cause of action. The language and placement of the Act reinforce this conclusion, in that the Act is an addendum to, and is therefore clearly intended to have the same operative effect as, the federal full faith and credit statute, the Act's heading is "Full faith and credit given to child custody determinations," and, unlike statutes that explicitly confer a right on a specified class of persons, the Act is addressed to States and to state courts. Moreover, in discussing the congressional rejection of a competing legislative proposal that would have extended the district courts' diversity jurisdiction to custody decree enforcement actions, the PKPA's legislative history provides an unusually clear indication that Congress did not intend the federal courts to play the enforcement role.

The fact that the cause of action petitioner seeks to infer is narrower than the congressionally rejected alternative is not controlling, since the federal courts would still be entangled in traditional state-law questions that they have little expertise to resolve. The argument that failure to infer a cause of action would render the PKPA nugatory is also not persuasive, since it is based on the unacceptable presumption that the States are either unable or unwilling to enforce the Act's provisions, and since ultimate review remains available in this Court for truly intractable deadlocks. Pp. 179–187.

798 F. 2d 1547, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, BLACKMUN, and STEVENS, JJ., joined, and in all but the first full paragraph of Part II of which O'CONNOR, J., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 188. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 188.

Ronald W. Weiss argued the cause and filed a brief for petitioner.

Kenneth Rigby argued the cause and filed briefs for respondent.*

JUSTICE MARSHALL delivered the opinion of the Court.

We granted certiorari in this case to determine whether the Parental Kidnaping Prevention Act of 1980, 28 U. S. C. § 1738A, furnishes an implied cause of action in federal court to determine which of two conflicting state custody decisions is valid.

I

The Parental Kidnaping Prevention Act (PKPA or Act) imposes a duty on the States to enforce a child custody determination entered by a court of a sister State if the determina-

*Briefs of *amici curiae* urging reversal were filed for Sacramento County et al. by *L. B. Elam, Steven M. Basha, Mark A. Wasser, Ann M. Haralambie*, and *DeWitt W. Clinton;* and for the Women's Legal Defense Fund et al. by *Edward R. Leahy* and *Steven A. Fennell.*

tion is consistent with the provisions of the Act.[1] In order for a state court's custody decree to be consistent with the provisions of the Act, the State must have jurisdiction under its own local law and one of five conditions set out in

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[1] Section 1738A reads in relevant part:

"(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State.

. . . . . .

"(c) A child custody determination made by a court of a State is consistent with the provisions of this section only if—

"(1) such court has jurisdiction under the law of such state; and

"(2) one of the following conditions is met:

"(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

"(B)(i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

"(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse;

"(D)(i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

"(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

"(d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as

§ 1738A(c)(2) must be met. Briefly put, these conditions authorize the state court to enter a custody decree if the child's home is or recently has been in the State, if the child has no home State and it would be in the child's best interest for the State to assume jurisdiction, or if the child is present in the State and has been abandoned or abused. Once a State exercises jurisdiction consistently with the provisions of the Act, no other State may exercise concurrent jurisdiction over the custody dispute, § 1738A(g), even if it would have been empowered to take jurisdiction in the first instance,[2] and all States must accord full faith and credit to the first State's ensuing custody decree.

As the legislative scheme suggests, and as Congress explicitly specified, one of the chief purposes of the PKPA is to "avoid jurisdictional competition and conflict between State courts." Pub. L. 96–611, 94 Stat. 3569, § 7(c)(5), note following 28 U. S. C. § 1738A. This case arises out of a jurisdictional stalemate that came to pass notwithstanding the strictures of the Act. In July 1978, respondent Susan Clay (then Susan Thompson) filed a petition in Los Angeles Superior Court asking the court to dissolve her marriage to petitioner David Thompson and seeking custody of the couple's infant

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long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

. . . . .

"(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if—

"(1) it has jurisdiction to make such a child custody determination; and

"(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

"(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination."

[2] The sole exception to this constraint occurs where the first State either has lost jurisdiction or has declined to exercise continuing jurisdiction. See § 1738A(f).

son, Matthew. The court initially awarded the parents joint custody of Matthew, but that arrangement became infeasible when respondent decided to move from California to Louisiana to take a job. The court then entered an order providing that respondent would have sole custody of Matthew once she left for Louisiana. This state of affairs was to remain in effect until the court investigator submitted a report on custody, after which the court intended to make a more studied custody determination. See App. 6.

Respondent and Matthew moved to Louisiana in December 1980. Three months later, respondent filed a petition in Louisiana state court for enforcement of the California custody decree, judgment of custody, and modification of petitioner's visitation privileges. By order dated April 7, 1981, the Louisiana court granted the petition and awarded sole custody of Matthew to respondent. Two months later, however, the California court, having received and reviewed its investigator's report, entered an order awarding sole custody of Matthew to petitioner. Thus arose the current impasse.

In August 1983, petitioner brought this action in the District Court for the Central District of California. Petitioner requested an order declaring the Louisiana decree invalid and the California decree valid, and enjoining the enforcement of the Louisiana decree. Petitioner did not attempt to enforce the California decree in a Louisiana state court before he filed suit in federal court. The District Court granted respondent's motion to dismiss the complaint for lack of subject-matter and personal jurisdiction. Civ. Action No. 83–5221 (Apr. 10, 1984). The Court of Appeals for the Ninth Circuit affirmed. Although it disagreed with the District Court's jurisdictional analyses, the Court of Appeals affirmed the dismissal of the complaint on the ground that petitioner had failed to state a claim upon which relief could be granted. 798 F. 2d 1547 (1986). Canvassing the background, language, and legislative history of the PKPA, the Court of Appeals held that the Act does not cre-

ate a private right of action in federal court to determine the validity of two conflicting custody decrees. *Id.*, at 1552–1559. We granted certiorari, 479 U. S. 1063 (1987), and we now affirm.

II

In determining whether to infer a private cause of action from a federal statute, our focal point is Congress' intent in enacting the statute. As guides to discerning that intent, we have relied on the four factors set out in *Cort* v. *Ash*, 422 U. S. 66, 78 (1975), along with other tools of statutory construction. See *Daily Income Fund, Inc.* v. *Fox*, 464 U. S. 523, 535–536 (1984); *California* v. *Sierra Club*, 451 U. S. 287, 293 (1981); *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 575–576 (1979). Our focus on congressional intent does not mean that we require evidence that Members of Congress, in enacting the statute, actually had in mind the creation of a private cause of action. The implied cause of action doctrine would be a virtual dead letter were it limited to correcting drafting errors when Congress simply forgot to codify its evident intention to provide a cause of action. Rather, as an *implied* cause of action doctrine suggests, "the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question." *Cannon* v. *University of Chicago*, 441 U. S. 677, 694 (1979). We therefore have recognized that Congress' "intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 18 (1979). The intent of Congress remains the ultimate issue, however, and "unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U. S. 77, 94 (1981). In this case, the essential predicate for implication of a private remedy plainly does not exist. None of the factors

that have guided our inquiry in this difficult area point in favor of inferring a private cause of action. Indeed, the context, language, and legislative history of the PKPA all point sharply away from the remedy petitioner urges us to infer.

We examine initially the context of the PKPA with an eye toward determining Congress' perception of the law that it was shaping or reshaping. See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 378 (1982); *Cort* v. *Ash*, *supra*, at 69. At the time Congress passed the PKPA, custody orders held a peculiar status under the full faith and credit doctrine, which requires each State to give effect to the judicial proceedings of other States, see U. S. Const., Art. IV, § 1; 28 U. S. C. § 1738. The anomaly traces to the fact that custody orders characteristically are subject to modification as required by the best interests of the child. As a consequence, some courts doubted whether custody orders were sufficiently "final" to trigger full faith and credit requirements, see, *e. g.*, *Hooks* v. *Hooks*, 771 F. 2d 935, 948 (CA6 1985); *McDougald* v. *Jenson*, 596 F. Supp. 680, 684–685 (ND Fla. 1984), aff'd, 786 F. 2d 1465 (CA11), cert. denied, 479 U. S. 860 (1986), and this Court had declined expressly to settle the question. See *Ford* v. *Ford*, 371 U. S. 187, 192 (1962). Even if custody orders were subject to full faith and credit requirements, the Full Faith and Credit Clause obliges States only to accord the same force to judgments as would be accorded by the courts of the State in which the judgment was entered. Because courts entering custody orders generally retain the power to modify them, courts in other States were no less entitled to change the terms of custody according to their own views of the child's best interest. See *New York ex rel. Halvey* v. *Halvey*, 330 U. S. 610, 614–615 (1947). For these reasons, a parent who lost a custody battle in one State had an incentive to kidnap the child and move to another State to relitigate the issue. This circumstance contributed to widespread jurisdictional deadlocks like this one, and more importantly, to a national epidemic of parental kid-

naping. At the time the PKPA was enacted, sponsors of the Act estimated that between 25,000 and 100,000 children were kidnaped by parents who had been unable to obtain custody in a legal forum. See Parental Kidnaping Prevention Act of 1979: Joint Hearing on S. 105 before the Subcommittee on Criminal Justice of the Judiciary Committee and the Subcommittee on Child and Human Development of the Committee on Labor and Human Resources, 96th Cong., 2d Sess., 10 (1980) (hereinafter PKPA Joint Hearing) (statement of Sen. Malcolm Wallop).

A number of States joined in an effort to avoid these jurisdictional conflicts by adopting the Uniform Child Custody Jurisdiction Act (UCCJA), 9 U. L. A. §§ 1–28 (1979). The UCCJA prescribed uniform standards for deciding which State could make a custody determination and obligated enacting States to enforce the determination made by the State with proper jurisdiction. The project foundered, however, because a number of States refused to enact the UCCJA while others enacted it with modifications. In the absence of uniform national standards for allocating and enforcing custody determinations, noncustodial parents still had reason to snatch their children and petition the courts of any of a number of haven States for sole custody.

The context of the PKPA therefore suggests that the principal problem Congress was seeking to remedy was the inapplicability of full faith and credit requirements to custody determinations. Statements made when the Act was introduced in Congress forcefully confirm that suggestion. The sponsors and supporters of the Act continually indicated that the purpose of the PKPA was to provide for nationwide enforcement of custody orders made in accordance with the terms of the UCCJA. As Acting Deputy Attorney General Michel testified:

> "[C]urrent law in many States encourages a parent who does not have custody to snatch the child from the parent who does and take the child to another State to relitigate

> the custody issue in a new forum. This kind of 'forum shopping' is possible because child custody orders are subject to modification to conform with changes in circumstances. Consequently, a court deciding a custody case is not, as a Federal constitutional requirement of the full faith and credit clause, bound by a decree by a court of another State even where the action involves the same parties.
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> . . . . .
>
> "In essence [the PKPA] would impose on States a Federal duty, under enumerated standards derived from the UCCJA, to give full faith and credit to the custody decrees of other States. Such legislation would, in effect, amount to Federal adoption of key provisions of the UCCJA for all States and would eliminate the incentive for one parent to remove a minor child to another jurisdiction." PKPA Joint Hearing 48.[3]

The significance of Congress' full faith and credit approach to the problem of child snatching is that the Full Faith and Credit Clause, in either its constitutional or statutory incarnations, does not give rise to an implied federal cause of action. *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 72 (1904); see 13B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3563, p. 50 (1984). Rather, the Clause "only prescribes a rule by which courts, Federal and state, are to be guided when a question arises in the

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[3] Mr. Michel's remarks are echoed in numerous other portions of the legislative history. See, *e. g.*, PKPA Joint Hearing 40–41 (statement of Sen. Durenberger); *id.*, at 12 (statement of Sen. Wallop); PKPA: Addendum to Joint Hearing on S. 105 before the Subcommittee on Criminal Justice of the Committee on the Judiciary and the Subcommittee on Child and Human Development of the Committee on Labor and Human Resources, 96th Cong., 2d Sess., 104–105 (1980) (hereinafter Addendum to Joint Hearing) (letter from Assistant Attorney General Patricia Wald to Rep. Peter Rodino).

progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a State other than that in which the court is sitting." *Northern Securities*, *supra*, at 72. Because Congress' chief aim in enacting the PKPA was to extend the requirements of the Full Faith and Credit Clause to custody determinations, the Act is most naturally construed to furnish a rule of decision for courts to use in adjudicating custody disputes and not to create an entirely new cause of action. It thus is not compatible with the purpose and context of the legislative scheme to infer a private cause of action. See *Cort* v. *Ash*, 422 U. S., at 78.

The language and placement of the statute reinforce this conclusion. The PKPA, 28 U. S. C. § 1738A, is an addendum to the full faith and credit statute, 28 U. S. C. § 1738. This fact alone is strong proof that the Act is intended to have the same operative effect as the full faith and credit statute. Similarly instructive is the heading to the PKPA: "Full faith and credit given to child custody determinations." As for the language of the Act, it is addressed entirely to States and state courts. Unlike statutes that explicitly confer a right on a specified class of persons, the PKPA is a mandate directed to state courts to respect the custody decrees of sister States. See *Cannon* v. *University of Chicago*, 441 U. S., at 690, n. 13; *Cort* v. *Ash*, *supra*, at 81–82. We agree with the Court of Appeals that "[i]t seems highly unlikely Congress would follow the pattern of the Full Faith and Credit Clause and section 1738 by structuring section 1738A as a command to state courts to give full faith and credit to the child custody decrees of other states, and yet, without comment, depart from the enforcement practice followed under the Clause and section 1738." 798 F. 2d, at 1556.

Finally, the legislative history of the PKPA provides unusually clear indication that Congress did not intend the fed-

eral courts to play the enforcement role that petitioner urges. Two passages are particularly revealing. The first of these is a colloquy between Congressmen Conyers and Fish. Congressman Fish had been the sponsor of a competing legislative proposal—ultimately rejected by Congress—that would have extended the district courts' diversity jurisdiction to encompass actions for enforcement of state custody orders. In the following exchange, Congressman Conyers questioned Congressman Fish about the differences between his proposal and "the Bennett proposal," which was a precursor to the PKPA.

> "Mr. Conyers: Could I just interject, the difference between the Bennett proposal and yours: You would have, enforcing the full faith and credit provision, the parties removed to a Federal court. Under the Bennett provision, his bill would impose the full faith and credit enforcement on the State court.
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> "It seems to me that that is a very important difference. The Federal jurisdiction, could it not, Mr. Fish, result in the Federal court litigating between two State court decrees; whereas, in an alternate method previously suggested, we would be imposing the responsibility of the enforcement upon the State court, and thereby reducing, it seems to me, the amount of litigation.
>
> "Do you see any possible merit in leaving the enforcement at the State level, rather than introducing the Federal judiciary?
>
> "Mr. Fish: Well, I really think that it is easier on the parent that has custody of the child to go to the nearest Federal district court . . . .
>
> "Mr. Conyers: Of course you know that the Federal courts have no experience in these kinds of matters, and they would be moving into this other area. I am just thinking of the fact that they have [many areas of federal concern and] on the average of a 21-month docket, you

> would now be imposing custody matters which it seems might be handled in the courts that normally handle that . . . ." Parental Kidnaping: Hearing on H. R. 1290 before the Subcommittee on Crime of the House Committee on the Judiciary, 96th Cong., 2d Sess., 14 (1980).

This exchange suggests that Congress considered and rejected an approach to the problem that would have resulted in a "Federal court litigating between two State court decrees." *Ibid.*

The second noteworthy entry in the legislative history is a letter from then Assistant Attorney General Patricia Wald to the Chairman of the House Judiciary Committee, which was referred to extensively during the debate on the PKPA. The letter outlined a variety of solutions to the child-snatching problem. It specifically compared proposals that would "grant jurisdiction to the federal courts to enforce state custody decrees" with an approach, such as was proposed in the PKPA, that would "impose on states a federal duty, under enumerated standards derived generally from the UCCJA, to give full faith and credit to the custody decrees of other states." Addendum to Joint Hearing 103. The letter endorsed the full faith and credit approach that eventually was codified in the PKPA. More importantly, it "strongly oppose[d] . . . the creation of a federal forum for resolving custody disputes." *Id.*, at 108. Like Congressman Conyers, the Justice Department reasoned that federal enforcement of state custody decrees would increase the workload of the federal courts and entangle the federal judiciary in domestic relations disputes with which they have little experience and which traditionally have been the province of the States. That the views of the Justice Department and Congressman Conyers prevailed, and that Congress explicitly opted for a full faith and credit approach over reliance on enforcement by the federal courts, provide strong evidence against inferring a federal cause of action. Cf. *Cort* v. *Ash*,

422 U. S., at 82 (congressional determination not to create a private cause of action is dispositive).

Petitioner discounts these portions of the legislative history. He argues that the cause of action that he asks us to infer arises only in cases of an actual conflict between two state custody decrees, and thus is substantially narrower than the cause of action proposed by Congressman Fish and rejected by Congress. The Fish bill would have extended federal diversity jurisdiction to permit federal courts to enforce custody orders in the first instance, before a second State had created a conflict by refusing to do so. This cause of action admittedly is farther reaching than that which we reject today. But the considerations that prompted Congress to reject the Fish bill also militate against the more circumscribed role for the federal courts that petitioner proposes. See *Rogers* v. *Platt*, 259 U. S. App. D. C. 154, 164, 814 F. 2d 683, 693 (1987). Instructing the federal courts to play Solomon where two state courts have issued conflicting custody orders would entangle them in traditional state-law questions that they have little expertise to resolve.[4] This is

[4] Petitioner argues that determining which of two conflicting custody decrees should be given effect under the PKPA would not require the federal courts to resolve the merits of custody disputes and thus would not offend the longstanding tradition of reserving domestic relations matters to the States. Petitioner contends that the cause of action he champions would require federal courts only to analyze which of two States is given exclusive jurisdiction under a federal statute, a task for which the federal courts are well qualified. We cannot agree with petitioner that making a jurisdictional determination under the PKPA would not involve the federal courts in substantive domestic relations determinations. Under the Act, jurisdiction can turn on the child's "best interest" or on proof that the child has been abandoned or abused. See §§ 1738A (c)(2)(B), (C), and (D). In fact, it would seem that the jurisdictional disputes that are sufficiently complicated as to have provoked conflicting state-court holdings are the most likely to require resolution of these traditional domestic relations inquiries. See *Rogers* v. *Platt*, 259 U. S. App. D. C. 154, 162, 814 F. 2d 683, 691 (1987). Cf. *Cort* v. *Ash*, 422 U. S. 66, 84 (1975) (possibility that implied federal cause of action *may* in certain instances turn on state-law issues counsels against inferring such an action.)

a cost that Congress made clear it did not want the PKPA to carry.[5]

In sum, the context, language, and history of the PKPA together make out a conclusive case against inferring a cause of action in federal court to determine which of two conflicting state custody decrees is valid. Against this impressive evidence, petitioner relies primarily on the argument that failure to infer a cause of action would render the PKPA nugatory. We note, as a preliminary response, that ultimate review remains available in this Court for truly intractable jurisdictional deadlocks. In addition, the unspoken presumption in petitioner's argument is that the States are either unable or unwilling to enforce the provisions of the Act. This is a presumption we are not prepared, and more importantly, Congress was not prepared, to indulge. State courts faithfully administer the Full Faith and Credit Clause every day; now that Congress has extended full faith and credit requirements to child custody orders, we can think of no reason why the courts' administration of federal law in custody disputes will be any less vigilant. Should state courts prove as obstinate as petitioner predicts, Congress may choose to revisit the issue. But any more radical approach to the problem will have to await further legislative action; we "will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *California* v. *Sierra Club*, 451 U. S. 287, 297 (1981). The judgment of the Court of Appeals is affirmed.

It is so ordered.

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[5] Moreover, petitioner's argument serves to underscore the extraordinary nature of the cause of action he urges us to infer. Petitioner essentially asks that federal district courts exercise appellate review of state-court judgments. This is an unusual cause of action for Congress to grant, either expressly or by implication. Petitioner's proposal is all the more remarkable in the present case, in which he seeks to have a Federal District Court in California enjoin enforcement of a Louisiana state-court judgment before the intermediate and highest appellate courts of Louisiana even have had an opportunity to review that judgment.

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

For the reasons expressed by JUSTICE SCALIA in Part I of his opinion in this case, I join all but the first full paragraph of Part II of the Court's opinion and judgment.

JUSTICE SCALIA, concurring in the judgment.

I write separately because in my view the Court is not being faithful to current doctrine in its dicta denying the necessity of an actual congressional intent to create a private right of action, and in referring to *Cort* v. *Ash*, 422 U. S. 66 (1975), as though its analysis had not been effectively overruled by our later opinions. I take the opportunity to suggest, at the same time, why in my view the law revision that the Court's dicta would undertake moves in precisely the wrong direction.

I

I agree that the Parental Kidnaping Prevention Act, 28 U. S. C. § 1738A, does not create a private right of action in federal court to determine which of two conflicting child custody decrees is valid. I disagree, however, with the portion of the Court's analysis that flows from the following statement:

> "Our focus on congressional intent does not mean that we require evidence that Members of Congress, in enacting the statute, actually had in mind the creation of a private cause of action." *Ante*, at 179.

I am at a loss to imagine what congressional intent to create a private right of action might mean, if it does not mean that Congress had in mind the creation of a private right of action. Our precedents, moreover, give no indication of a secret meaning, but to the contrary seem to use "intent" to mean "intent." For example:

> "[T]he focus of the inquiry is on whether Congress intended to create a remedy. *Universities Research Assn., Inc.* v. *Coutu*, 450 U. S., at 771–772; *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. at 23–24; *Touche Ross & Co.* v. *Redington*, [442 U. S.], at 575–576. The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *California* v. *Sierra Club*, 451 U. S. 287, 297 (1981) (WHITE, J.).

We have said, to be sure, that the existence of intent may be inferred from various indicia; but that is worlds apart from today's Delphic pronouncement that intent is required but need not really exist.

I also find misleading the Court's statement that, in determining the existence of a private right of action, "we have relied on the four factors set out in *Cort* v. *Ash*, . . . along with other tools of statutory construction." *Ante*, at 179. That is not an accurate description of what we have done. It could not be plainer that we effectively overruled the *Cort* v. *Ash* analysis in *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 575–576 (1979), and *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 18 (1979), converting one of its four factors (congressional intent) into *the determinative factor*, with the other three merely indicative of its presence or absence. Compare *Cort* v. *Ash*, *supra*, at 78, with *Transamerica*, *supra*, at 23–24.

Finally, the Court's opinion conveys a misleading impression of current law when it proceeds to examine the "context" of the legislation for indication of intent to create a private right of action, after having found no such indication in either text or legislative history. In my view that examination is entirely superfluous, since context alone cannot suffice. We have held context to be relevant to our determination in only two cases—both of which involved statutory language that, in the judicial interpretation of related legislation prior to the subject statute's enactment, or of the same legislation prior

to its reenactment, had been held to create private rights of action. See *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353 (1982). Since this is not a case where such textual support exists, or even where there is any support in legislative history, the "context" of the enactment is immaterial.

Contrary to what the language of today's opinion suggests, this Court has long since abandoned its hospitable attitude towards implied rights of action. In the 23 years since Justice Clark's opinion for the court in *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964), we have *twice* narrowed the test for implying a private right, first in *Cort* v. *Ash*, *supra*, itself, and then again in *Touche Ross & Co.* v. *Redington*, *supra*, and *Transamerica Mortgage Advisers, Inc.* v. *Lewis*, *supra*. See also *Cannon* v. *University of Chicago*, *supra*, at 730 (Powell, J., dissenting), and *California* v. *Sierra Club*, *supra*, at 301 (REHNQUIST, J., joined by Burger, C. J., and Stewart and Powell, JJ., concurring). The recent history of our holdings is one of repeated rejection of claims of an implied right. This has been true in 9 of 11 recent private right of action cases heard by this Court, including the instant case. See *Touche Ross*, *supra; Transamerica*, *supra; Universities Research Assn., Inc.* v. *Coutu*, 450 U. S. 754 (1981); *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U. S. 77, 91–94 (1981); *California* v. *Sierra Club*, *supra; Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 639–640 (1981); *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1, 13–18 (1981); *Daily Income Fund, Inc.* v. *Fox*, 464 U. S. 523, 535–536 (1984); and *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U. S. 134, 145–148 (1985). But see *Merrill Lynch*, *supra*, and *Cannon*, *supra*. The Court's opinion exaggerates the difficulty of establishing an implied right when it surmises that "[t]he implied cause of action doctrine would be a virtual dead letter were it limited to correcting drafting errors when Congress simply forgot to codify its evident intention to provide a

cause of action." *Ante*, at 179. That statement rests upon the erroneous premise that one never implies anything except when he forgets to say it expressly. It is true, however, that the congressional intent test for implying private rights of action as it has evolved since the repudiation of *Cort* v. *Ash* is much more stringent than the Court's dicta in the present case suggest.

II

I have found the Court's dicta in the present case particularly provocative of response because it is my view that, if the current state of the law were to be changed, it should be moved in precisely the opposite direction—away from our current congressional intent test to the categorical position that federal private rights of action will not be implied.

As Justice Powell observed in his dissent in *Cannon*, *supra*, at 730–731:

> "Under Art. III, Congress alone has the responsibility for determining the jurisdiction of the lower federal courts. As the Legislative Branch, Congress also should determine when private parties are to be given causes of action under legislation it adopts. As countless statutes demonstrate, including Titles of the Civil Rights Act of 1964, Congress recognizes that the creation of private actions is a legislative function and frequently exercises it. When Congress chooses not to provide a private civil remedy, federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction." (Footnote omitted.)

It is, to be sure, not beyond imagination that in a particular case Congress may intend to create a private right of action, but chooses to do so by implication. One must wonder, however, whether the good produced by a judicial rule that accommodates this remote possibility is outweighed by its adverse effects. An enactment by implication cannot realistically be regarded as the product of the difficult lawmaking process our Constitution has prescribed. Committee reports,

floor speeches, and even colloquies between Congressmen, *ante*, at 184–185, are frail substitutes for bicameral vote upon the text of a law and its presentment to the President. See generally *INS* v. *Chadha*, 462 U. S. 919 (1983). It is at best dangerous to assume that all the necessary participants in the law-enactment process are acting upon the same unexpressed assumptions. And likewise dangerous to assume that, even with the utmost self-discipline, judges can prevent the implications they see from mirroring the policies they favor.

I suppose all this could be said, to a greater or lesser degree, of *all* implications that courts derive from statutory language, which are assuredly numerous as the stars. But as the likelihood that Congress would leave the matter to implication decreases, so does the justification for bearing the risk of distorting the constitutional process. A legislative act so significant, and so separable from the remainder of the statute, as the creation of a private right of action seems to me so implausibly left to implication that the risk should not be endured.

If we were to announce a flat rule that private rights of action will not be implied in statutes hereafter enacted, the risk that that course would occasionally frustrate genuine legislative intent would decrease from its current level of minimal to virtually zero. It would then be true that the opportunity for frustration of intent "would be a virtual dead letter[,] . . . limited to . . . drafting errors when Congress simply forgot to codify its . . . intention to provide a cause of action." *Ante*, at 179. I believe, moreover, that Congress would welcome the certainty that such a rule would produce. Surely conscientious legislators cannot relish the current situation, in which the existence or nonexistence of a private right of action depends upon which of the opposing legislative forces may have guessed right as to the implications the statute will be found to contain.

If a change is to be made, we should get out of the business of implied private rights of action altogether.

Syllabus

DEAKINS ET AL. *v.* MONAGHAN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 86–890. Argued October 14, 1987—Decided January 12, 1988

Upon application for a warrant to search one of the corporate respondents' premises for evidence of theft and other crimes that were the subject of an ongoing state grand jury investigation, a state-court judge issued a warrant authorizing petitioner law enforcement officers to seize documents. Alleging that petitioners' execution of the warrant violated various of their federal constitutional rights and engendered certain pendent state-law claims, respondent business entities and their owners filed suit under 42 U. S. C. § 1983 in Federal District Court seeking equitable relief, including the return of all documents seized, compensatory and punitive damages, and attorney's fees. The court granted petitioners' motion to dismiss on abstention grounds, but the Court of Appeals reversed and remanded, ruling that *Younger* v. *Harris*, 401 U. S. 37, and its progeny did not require the District Court to abstain from adjudicating respondents' equitable claims. As to respondents' claims for money damages and attorney's fees, the Court of Appeals applied its Circuit's rule that, even when abstaining entirely from the adjudication of equitable claims, a District Court is required to stay rather than to dismiss federal claims that are not cognizable in the state forum. Subsequently, the grand jury returned an indictment against three of the respondents, and the state trial court to which the indictment was assigned took jurisdiction over respondents' equitable claims for the return of the seized documents. Respondents represent here that they wish to withdraw such claims from their federal complaint and seek injunctive relief exclusively in the state proceedings.

Held:

1. In light of respondents' aforesaid representation to this Court, there is no longer a live controversy between the parties over whether a federal court can hear the equitable claims, and the abstention issue is moot in this regard. Accordingly, the portion of the Court of Appeals' judgment addressing those claims is vacated, and the case is remanded with instructions to dismiss the claims with prejudice. This disposition will prevent a regeneration of the controversy by respondents' reassertion of the right to litigate in federal court their equitable claims arising out of the events surrounding the search warrant's execution. Pp. 199–201.

2. Even if the *Younger* doctrine required abstention here, the District Court had no discretion to dismiss rather than to stay respondents' claims for monetary relief that cannot be redressed in the state proceeding. The Circuit rule requiring a stay in such circumstances is sound since it allows the parallel state proceeding to go forward without interference from its federal sibling, while enforcing the federal courts' duty to exercise their jurisdiction. Petitioners' assertion that this case presents extraordinary circumstances sufficient to justify abdication of that duty is unpersuasive. First, the speculation that the District Court, if allowed to retain jurisdiction, would "hover" intrusively about the state proceeding is based on the groundless assumption that the District Court would not hold up its end of the comity bargain. Second, even if *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, would prevent the District Court from adjudicating respondents' state-law claims as petitioners contend, this would not require the dismissal of respondents' federal damages claims, which are substantial and sufficient to justify the District Court's retention of jurisdiction. Third, the dismissal of the federal complaint would not prevent piecemeal litigation, which is inevitable even without federal-court involvement since the state criminal proceeding can provide only equitable relief. Pp. 201–204.

798 F. 2d 632, affirmed in part, vacated in part, and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, MARSHALL, STEVENS, and SCALIA, JJ., joined. WHITE, J., filed a concurring opinion, in which O'CONNOR, J., joined, *post*, p. 205.

Larry R. Etzweiler, Deputy Attorney General of New Jersey, argued the cause for petitioners. With him on the briefs were *W. Cary Edwards*, Attorney General, and *Allan J. Nodes* and *Steven Pasternak*, Deputy Attorneys General.

Edward N. Fitzpatrick argued the cause for respondents. With him on the brief were *Patrick T. McGahn, Jr.*, *Robert J. Fettweis*, and *Kathy M. Hooke*.*

JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents questions concerning a federal court's obligation to abstain from the adjudication of federal claims

**Frank Askin*, *Eric Neisser*, and *John A. Powell* filed a brief for the American Civil Liberties Union Foundation et al. as *amici curiae* urging affirmance.

arising out of an ongoing state grand jury investigation. We granted certiorari, 479 U. S. 1063 (1987), to consider whether the District Court, under *Younger* v. *Harris*, 401 U. S. 37 (1971), was required to abstain from adjudicating respondents' claims for injunctive relief, and, if so, whether the court had the discretion to dismiss, rather than to stay, respondents' additional claims for damages and attorney's fees. Because we have concluded that the first issue is now moot, we vacate that portion of the Court of Appeals' judgment and remand with directions to dismiss all claims for equitable relief. We affirm, however, the remaining portion of the Court of Appeals' judgment reversing the District Court's dismissal of respondents' claims for monetary relief.

I

Respondents William Monaghan, Theodore DeSantis, and John James are in the construction business together. They jointly own respondents Foundations & Structures, Inc. (F & S), and MJD Construction Company, Inc., New Jersey corporations, and William E. Monaghan Associates, a New Jersey general partnership. On October 4, 1984, petitioner Albert G. Palentchar, a criminal investigator for the State of New Jersey, applied to the Honorable Samuel T. Lenox, Jr., the "assignment judge" of the Superior Court for Mercer County with supervisory authority over the state grand jury, for a warrant to search the Tuckahoe, N. J., premises of F & S for evidence of theft, bribery, records tampering, and other criminal activities that were the subject of an ongoing state grand jury investigation. Judge Lenox found probable cause and issued a warrant authorizing the seizure of documents, including contracts, minutes, site logs, invoices, correspondence, memoranda, deeds, canceled checks, and bank statements. The validity of this warrant has not been contested.

The following morning, Palentchar and eight other New Jersey law enforcement officers, all petitioners here, exe-

cuted the warrant. The search lasted approximately eight hours. In their federal complaint, respondents allege that, in addition to seizing hundreds of documents, petitioners barricaded the sole exit from the premises, searched all departing vehicles, recorded the serial numbers on F & S machinery, detained in one room all persons on the premises at the time of the search until they produced identification, threatened to tear apart respondents' homes if the documents were not discovered, and engaged in a number of other unlawful activities. See Complaint in No. 84–5369 (D NJ), pp. 7–9, 10. The execution of the warrant gave rise to the federal litigation now before us.

Respondents' attorneys arrived while the search was in progress and challenged the adequacy under New Jersey law of the inventory procedure. To resolve the dispute, respondents' counsel and petitioner Deakins telephoned Judge Lenox, who ordered all seized materials sealed pending his assessment of the procedure. Ten days later, on October 15, 1984, New Jersey's Deputy Attorney General Julian Wilsey invited respondents' counsel to examine the documents under seal and to copy whatever documents respondents needed in order to continue the conduct of their business. General Wilsey also informed respondents' counsel that the State was prepared to return any documents discovered that exceeded the scope of the warrant. In the course of this examination, counsel identified numerous documents that they contended were either outside the scope of the warrant or protected by the attorney-client or attorney-work-product privilege. The State disagreed, and the disputed documents were resealed under the authority of Judge Lenox's original sealing order.

On December 27, while the documents were still under seal, respondents instituted this civil rights action under 42 U. S. C. § 1983 in the United States District Court for the District of New Jersey. Respondents sought equitable relief, including the return of all documents seized, and, as well, compensatory and punitive damages for the alleged vi-

olations of their rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments, and attorney's fees. Respondents also asserted certain pendent state claims for trespass, conversion, unlawful confinement, and the intentional or reckless infliction of emotional distress. Prior to filing an answer, petitioners moved to dismiss the complaint, arguing that the existence of an ongoing state grand jury investigation required the federal court to abstain from adjudicating disputes arising out of that investigation. Respondents countered with a motion for a preliminary injunction directing the return of the documents.

While all this was taking place in federal court, Judge Lenox, at the State's behest, entered an *ex parte* order directing respondents to show cause why he should not lift the seal and make the documents available to the state officials conducting the grand jury investigation. Three days before the scheduled hearing on that order to show cause, the District Court issued a temporary restraining order staying discovery in the federal action and directing the State not to lift the seal before the District Court disposed of the motions pending before it. Several months later, on August 6, 1985, the District Court granted petitioners' motion to dismiss on abstention grounds and denied respondents' motion for a preliminary injunction. App. to Pet. for Cert. 5a.

On appeal, the Court of Appeals for the Third Circuit affirmed the District Court's denial of the preliminary injunction but reversed the judgment dismissing the complaint. 798 F. 2d 632 (1986). A divided panel ruled that the abstention doctrine pronounced in *Younger* v. *Harris*, 401 U. S. 37 (1971), and its progeny did not require the District Court to abstain from adjudicating respondents' claims for injunctive relief arising out of the ongoing state grand jury investigation. The panel was unanimous, however, in reversing the District Court's dismissal of respondents' claims for money damages and attorney's fees. Relying on Circuit precedent, the Court of Appeals held that, even when abstaining en-

tirely from the adjudication of equitable claims, a district court was required to stay rather than to dismiss federal claims that were not cognizable in the state forum in which the companion equitable claims were being adjudicated. 798 F. 2d, at 635–636, citing *Crane* v. *Fauver*, 762 F. 2d 325, 328–329 (CA3 1985); *Williams* v. *Red Bank Bd. of Ed.*, 662 F. 2d 1008, 1022–1024 (CA3 1981). The Court of Appeals noted that the availability of a separate state forum in which the monetary claims could be brought did nothing to lessen the District Court's obligation to retain jurisdiction over the claims properly before it. 798 F. 2d, at 635–636. The court remanded the case for further proceedings.

After the Court of Appeals rendered its judgment, the state grand jury returned an indictment against three of the respondents—Monaghan, DeSantis, and F & S—and against others not parties to the present federal action.[1] None of the seized documents had ever been submitted to the indicting grand jury, and the contested documents were still under seal at the time the indictment was returned. The Superior Court of New Jersey, Law Division, Cumberland County, to which the indictment was assigned for trial, took jurisdiction over respondents' equitable claims for the return of the seized documents. See Memorandum for Respondents Suggesting that Cause is Moot 3. The Superior Court has since held that certain documents were seized in violation of the attorney-client privilege and has ordered their return. See Tr. of Oral Arg. 22–23. Still pending before that court are motions seeking the return of other documents seized. See *id.*, at 23. In light of these developments, all six respondents represent, through common counsel, that they do not

[1] This fact is not reflected in the record but the parties have informed the Court in their briefs, in their memoranda as to mootness, and at oral argument, that the indictment had been returned. See Brief for Petitioners 18; Brief for Respondents 17; Memorandum for Respondents Suggesting that Cause is Moot 3; Memorandum for Petitioners in Opposition to Suggestion 2; Tr. of Oral Arg. 6–7 and 22.

wish to pursue their claims for equitable relief in federal court. *Id.*, at 22–25. They wish to withdraw these claims from their federal complaint and seek injunctive relief exclusively in the state proceedings initiated by the indictment. Respondents also represent that, if the complaint were remanded to the District Court, they would seek a stay of all federal proceedings on the damages claims pending resolution of the state proceedings. *Id.*, at 22, 25; Memorandum for Respondents Suggesting that Cause is Moot 4.

II

Article III of the Constitution limits federal courts to the adjudication of actual, ongoing controversies between litigants. *Preiser* v. *Newkirk*, 422 U. S. 395, 401 (1975); *SEC* v. *Medical Committee for Human Rights*, 404 U. S. 403, 407 (1972). It is not enough that a controversy existed at the time the complaint was filed, and continued to exist when review was obtained in the Court of Appeals. *Sosna* v. *Iowa*, 419 U. S. 393, 402 (1975); *Steffel* v. *Thompson*, 415 U. S. 452, 459, n. 10 (1974). In the case now before us, respondents state that they no longer seek any equitable relief in federal court.[2] Because there no longer is a live controversy between the parties over whether a federal court can hear respondents' equitable claims, the first question on which certiorari was granted is moot.[3]

Petitioners, however, object that respondents' promise to amend their complaint is an empty one, because nothing will prevent respondents, particularly those not indicted, from nullifying that amendment by further amendment or from filing a new complaint if they are dissatisfied with the relief obtained in the state criminal proceeding. Petitioners also ex-

[2] See Memorandum for Respondents Suggesting that Cause is Moot 3; Brief for Respondents 18; Tr. of Oral Arg. 22, 24–25.

[3] This Court rejected respondents' suggestion of mootness filed before argument. 482 U. S. 912 (1987). Representations of counsel in response to inquiries at oral argument now have persuaded us that the suggestion is sound as to the first question presented.

press concern that respondents will raise only some of their equitable claims in the state proceeding, thus preserving the option of pursuing the remaining claims in federal court. If respondents return to federal court while the grand jury investigation is still in progress, petitioners argue, the District Court would be bound by the decision of the Court of Appeals in this case and would refuse to abstain. To prevail on the abstention question, petitioners would then have to appeal to the very court that already had decided the question against them and ultimately petition successfully again for certiorari. Even then, petitioners suggest, respondents could use the same ploy once more to deprive this Court of jurisdiction. According to petitioners, this potential for manipulation renders the case "capable of repetition, yet evading review," and should therefore shield it from a conclusion of mootness. See *Murphy* v. *Hunt*, 455 U. S. 478, 482 (1982).

Petitioners misconceive the effect respondents' representations and our reliance thereon will have on the shape of the federal litigation. When a claim is rendered moot while awaiting review by this Court, the judgment below should be vacated with directions to the District Court to dismiss the relevant portion of the complaint. See *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39–40 (1950). This disposition strips the decision below of its binding effect. And respondents can be prevented from reviving their claims by the order of dismissal. Because this case was rendered moot in part by respondents' willingness permanently to withdraw their equitable claims from their federal action, a dismissal with prejudice is indicated. This will prevent the regeneration of the controversy by a reassertion of a right to litigate the equitable claims in federal court.[4] Relying upon the

[4] The Court's ability to prevent respondents from renewing their claims after they are dismissed as moot distinguishes this case from one in which a *defendant* attempts to avoid appellate review by voluntarily ceasing the challenged conduct without losing the ability to reinitiate the conduct once the mooted case is dismissed. In the latter circumstance this Court has

representations of respondents' counsel at oral argument that all six respondents have no continuing interest in the federal adjudication of their claims for equitable relief, the equitable claims of all respondents should be dismissed with prejudice. Respondents therefore will be barred from reviving in federal court their equitable claims against petitioners arising out of the events surrounding the execution of the search warrant.[5]

III

Our conclusion that the issue concerning respondents' equitable claims is now moot does not prevent our consideration of the propriety of the District Court's dismissal of respondents' claims for monetary relief. See *University of Texas* v. *Camenisch*, 451 U. S. 390, 393 (1981); *Powell* v. *McCormack*, 395 U. S. 486, 495–500 (1969). Respondents continue to press their claims for damages and attorney's fees. They state, however, that they will seek a stay of federal proceed-

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ruled that "[m]ere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.'" *United States* v. *Concentrated Phosphate Export Assn., Inc.*, 393 U. S. 199, 203 (1968), quoting *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632 (1953). In this case, the "conduct" that petitioners fear will be resumed is the pursuit of the federal litigation for equitable relief. Once that litigation is dismissed with prejudice, it cannot be resumed in this or any subsequent action. To reinitiate the abstention dispute between these parties, respondents would have to allege new equitable claims, presumably arising out of other events. The threat to petitioners, based on the mere "speculative contingenc[y]," *Hall* v. *Beals*, 396 U. S. 45, 49 (1969), that respondents will assert new federal claims for equitable relief against the same New Jersey law enforcement agents cannot be said to be "sufficiently real and immediate to show an existing controversy." *O'Shea* v. *Littleton*, 414 U. S. 488, 496 (1974).

[5] This, of course, is not to say that respondents would be prevented from asserting a right to present claims against these petitioners for equitable relief in federal court should the disputed conduct be repeated. The Court recognized in *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 40 (1950), that the vacation and dismissal of the complaint that has become moot "clears the path for future relitigation of the issues between the parties," should subsequent events rekindle their controversy.

ings on these claims pending resolution of the state proceeding. Tr. of Oral Arg. 25; Memorandum for Respondents Suggesting that Cause is Moot 4.

Petitioners argue that the *Younger* doctrine—which requires a federal court to abstain where a plaintiff's federal claims could be adjudicated in a pending state judicial proceeding—applies to complaints seeking only monetary relief. Petitioners further argue that it is within the District Court's discretion to dismiss rather than stay a federal complaint for damages and fees where abstention is required. We need not decide the extent to which the *Younger* doctrine applies to a federal action seeking only monetary relief, however, because even if the *Younger* doctrine requires abstention here, the District Court has no discretion to dismiss rather than to stay claims for monetary relief that cannot be redressed in the state proceeding.[6]

In reversing the District Court's dismissal of the claims for damages and attorney's fees, the Court of Appeals applied the Third Circuit rule that requires a District Court to stay rather than dismiss claims that are not cognizable in the parallel state proceeding. 798 F. 2d, at 635, citing *Crane* v. *Fauver*, 762 F. 2d 325 (1985), and *Williams* v. *Red Bank Bd. of Ed.*, 662 F. 2d 1008 (1981). The Third Circuit rule is sound. It allows a parallel state proceeding to go forward without interference from its federal sibling, while enforcing the duty of federal courts "to assume jurisdiction where juris-

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[6] In his concurring opinion in this case, JUSTICE WHITE urges that we reach the question—not considered at any stage below, and not the subject of our grant of certiorari—whether the *Younger* doctrine applies to cases in which only money damages are sought in the federal forum. Apparently, JUSTICE WHITE also finds it appropriate to conclude that *Younger* requires abstention in this particular case, although he does not analyze this question separately. Because all respondents have represented that they will seek a stay of their damages claims on remand, we see no reason to reach issues so awkwardly presented for review.

diction properly exists."[7] *Id.*, at 1024. This Court repeatedly has stated that the federal courts have a "virtually unflagging obligation" to exercise their jurisdiction except in those extraordinary circumstances "'where the order to the parties to repair to the State court would clearly serve an important countervailing interest.'" *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800, 813, 817 (1976), quoting *County of Allegheny* v. *Frank Mashuda Co.*, 360 U. S. 185, 188–189 (1959); see also *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U. S. 1, 14–15 (1983).

We are unpersuaded by petitioners' suggestion that this case presents such extraordinary circumstances. First, petitioners' speculation that the District Court, if allowed to retain jurisdiction, would "hover" about the state proceeding, ready to lift the stay whenever it concluded that things were proceeding unsatisfactorily, is groundless. Petitioners seem to assume that the District Court would not hold up its end of the comity bargain—an assumption as inappropriate as the converse assumption that the States cannot be trusted to enforce federal rights with adequate diligence. See *Stone* v. *Powell*, 428 U. S. 465, 493–494, n. 35 (1976).

Second, petitioners' contention that *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89 (1984), prevents the District Court from adjudicating respondents' claims under state law does not argue for the dismissal of all of respondents' damages claims, state and federal. Petitioners seem to suggest that the state-law claims predominate in the complaint, and the federal claims are minimal additions not substantial enough to require the District Court to exercise its jurisdiction. Saying nothing about the applicability of *Penn-*

[7] In both *Crane* v. *Fauver*, 762 F. 2d, at 329, and *Williams* v. *Red Bank Bd. of Ed.*, 662 F. 2d, at 1024, n. 16, the Court of Appeals recognized that unless it retained jurisdiction during the pendency of the state proceeding, a plaintiff could be barred permanently from asserting his claims in the federal forum by the running of the applicable statute of limitations.

hurst to the particular state-law claims alleged in respondents' complaint, we note that a sizable portion of the relief sought in the federal complaint is intended to compensate respondents for injuries allegedly sustained in violation of federal constitutional rights. There can be no question that respondents have alleged injuries under federal law sufficient to justify the District Court's retention of jurisdiction. When the federal proceeding recommences in the District Court, petitioners will be free to argue that the state claims should be dismissed under *Pennhurst*.

Finally, petitioners argue that allowing the District Court to dismiss the complaint will prevent the piecemeal litigation of the dispute between the parties. But the involvement of the federal courts cannot be blamed for the fragmentary nature of the proceedings in this litigation. Because the state criminal proceeding can provide only equitable relief, any action for damages would necessarily be separate. Indeed, the state forum in which petitioners invite respondents to pursue their claims for monetary relief clearly would require the initiation of a separate action. See Brief for Petitioners 32. Piecemeal litigation of the issues involved in this case is thus inevitable.

In sum, none of the circumstances cited by petitioners to justify the District Court's dismissal of respondents' claims for damages and attorney's fees constitutes the kind of extraordinary circumstance that we have held may justify abdication of the "virtually unflagging obligation . . . to exercise the jurisdiction given" the federal courts. *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S., at 817.

IV

Because respondents' claims for equitable relief are moot, we vacate the portion of the Court of Appeals' judgment addressing those claims and remand with instructions to dismiss the claims for equitable relief with prejudice. We affirm the portion of the Court of Appeals' judgment reversing

the District Court's dismissal of respondents' claims for monetary relief and attorney's fees.

It is so ordered.

JUSTICE WHITE, with whom JUSTICE O'CONNOR joins, concurring.

Respondents, targets of a state grand jury investigation, filed this § 1983 suit, alleging, *inter alia*, that petitioners had violated their federal constitutional rights in the execution of a search warrant and three grand jury subpoenas. The federal action sought damages as well as an order for the return of the seized property. Relying on *Younger* v. *Harris*, 401 U. S. 37 (1971), the District Court dismissed both the equitable and the damages claims. The Court of Appeals reversed. It held, first, that even if there was a need for abstention on respondents' claims for equitable relief, the District Court erred in dismissing the damages phase of the case, at least when that remedy may not be had in pending state proceedings. 798 F. 2d 632, 635 (CA3 1986). Second, the Court of Appeals held that a state grand jury investigation is not the kind of proceeding that calls for abstention under *Younger*. 798 F. 2d, at 636–638. We granted certiorari on both questions. 479 U. S. 1063 (1987).

I agree with the Court that the issue of *Younger*'s applicability to state grand jury proceedings is moot, and that the judgments of the Court of Appeals and the District Court must be vacated insofar as they dealt with that question. I concur in the Court's judgment that, because respondents are no longer seeking equitable relief in this action, the grand jury question is no longer properly before us. *Ante*, at 200–201. It is worth noting, however, that the reason respondents give for withdrawing their injunctive claim is that the return of an indictment against three of them has now created a state criminal proceeding in which their federal constitutional claims may be adjudicated. It is thus not surprising that respondents no longer seek a federal court injunction: had they not withdrawn their request or conceded that the indictments

mooted their injunctive claim, it is likely that we would have vacated the Court of Appeals' judgment and remanded in light of the intervening indictments.

The mooting of the claim for injunctive relief leaves the question whether the Court of Appeals was correct in reversing the District Court's dismissal of the damages claim. I agree with the Court that it was. To permit dismissal of a claim for damages when such relief may not be obtained in any pending state proceeding is surely not required by any notions of comity. Moreover, dismissal might foreclose, on statute of limitations grounds, the subsequent pursuit of a damages action in federal court in the event that the state court holds that a violation of constitutional rights took place. No doubt this is why Courts of Appeals which have applied *Younger* to damages actions have ordered stays, and not dismissals, of damages claims to which *Younger* applies.[1]

My difficulty with the Court's opinion is that, while approving the Court of Appeals' decision to stay and not dismiss the damages claim, it does not adequately explain why the federal courts must or may stay, rather than proceed to adjudicate, the federal constitutional claims for damages. After all, the Court's opinion cites the "virtually unflagging obligation" of the federal courts to adjudicate claims within their jurisdiction absent extraordinary circumstances, as we recognized in *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800 (1976). Why, then, stay the § 1983 damages claim asserting a violation of federal constitutional rights? Why does not the District Court's "unflagging obligation" require it to proceed on that claim?

In sanctioning this decision to stay, the Court recites the rule of the Third Circuit that when there is abstention on an equitable claim because of a pending state proceeding, the

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[1] See, *e. g.*, *McCurry* v. *Allen*, 606 F. 2d 795, 799 (CA8 1979), rev'd on other grounds, 449 U. S. 90 (1980); *Doby* v. *Strength*, 758 F. 2d 1405, 1406 (CA11 1985).

damages claim should be stayed and not dismissed. *Ante*, at 202–203, citing *Crane* v. *Fauver*, 762 F. 2d 325 (CA3 1985), and *Williams* v. *Red Bank Bd. of Ed.*, 662 F. 2d 1008 (CA3 1981).[2] The Third Circuit rule, which the Court endorses, appears to rest on "prudential considerations" and not on the view that *Younger* requires that a damages action be stayed when there is a parallel state criminal (or "quasi-criminal") proceeding underway. See, *e. g.*, *Crane* v. *Fauver*, *supra*, at 329. But we have never held that in all cases where there are parallel state and federal proceedings involving a federal constitutional issue, the federal court should hold its hand and allow the state court to proceed first.

To affirm the Court of Appeals' judgment ordering a stay requires a more substantial basis than "prudential consideration," and that basis is not difficult to find: it is that *Younger* requires, not only dismissal of the equitable claim in this case, but also that the damages action not go forward. Several times before this Court has declined to state that *Younger* applies to damages actions. *E. g.*, *Tower* v.

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[2] The Court also appears to rest its decision upon respondents' assurance that they will seek a stay of their federal damages action on remand, holding their claims in abeyance until the conclusion of the state criminal proceedings. *Ante*, at 201–202. There is a distinct difference, however, between the weight the Court should give this assurance, and the weight the Court properly accords to the representations which respondents made concerning the mootness of their equitable-relief claims.

With respect to the latter, the Court's reliance on respondents' disclaimer of any interest in equitable relief has resulted in a dismissal of these claims as moot. This dismissal, with prejudice, effectively prevents a reversal of position on the part of respondents. However, there is nothing in the Court's decision today that bars respondents from changing their views on seeking a stay of their damages claim. Such an altered litigation posture may come out of a good- or bad-faith change of heart, and may lead respondents to request an immediate adjudication of their damages claims. Unfortunately, for the reasons discussed above, the Court's opinion does not adequately address why the District Court must not accommodate such a renewed request.

Glover, 467 U. S. 914, 923 (1984); *Juidice* v. *Vail*, 430 U. S. 327, 339, n. 16 (1977). In the absence of direction from this Court, it now appears that a plurality of the Circuits apply the *Younger* doctrine—in some fashion—to damages claims like respondents'.[3]

The reasons for such an approach are obvious. As the *Younger* decision itself recognized, it has long been the rule that the federal courts should not interfere with or pre-empt the progress of state criminal proceedings. *Younger* v. *Harris*, 401 U. S., at 43–44, 53–54. A judgment in the federal damages action may decide several questions at issue in the state criminal proceeding. It may determine, for example, that certain evidence was seized contrary to the Fourth Amendment, or that an interrogation was conducted in violation of the Sixth Amendment, or that Fifth Amendment rights were somehow violated. In fact, in this case, such claims—and many more—are all being pressed by respondents in their § 1983 damages action. If the claims the Court remands today were disposed of on the merits by the District Court, this decision would presumably be owed res judicata effect in the forthcoming state criminal trial of respondents. "[T]he potential for federal-state friction is obvious." *Guerro* v. *Mulhearn*, 498 F. 2d 1249, 1253 (CA1 1974).[4]

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[3] See *Landrigan* v. *Warwick*, 628 F. 2d 736, 743 (CA1 1980); *McCurry* v. *Allen*, *supra*, at 799; *Mann* v. *Jett*, 781 F. 2d 1448, 1449 (CA9 1986); *Parkhurst* v. *State*, 641 F. 2d 775, 777 (CA10 1981); *Doby* v. *Strength*, *supra*, at 1406.

Some courts have taken a more ambiguous position, akin to the Third Circuit cases discussed *supra*. See, *e. g.*, *Suggs* v. *Brannon*, 804 F. 2d 274, 279 (CA4 1986); *Giulini* v. *Blessing*, 654 F. 2d 189, 193 (CA2 1981); *Singleton* v. *New York City*, 632 F. 2d 185, 190 (CA2 1980).

By contrast, the Fifth and Sixth Circuits both hold that *Younger* has no applicability to a claim for damages, see *Thomas* v. *Texas State Bd. of Medical Examiners*, 807 F. 2d 453, 457 (CA5 1987); *Carras* v. *Williams*, 807 F. 2d 1286, 1291–1292 (CA6 1986), although the Sixth Circuit's rule on this point appears to be "flexible," see *id.*, at 1292.

[4] It is not surprising that several Courts of Appeals, in considering whether or not *Younger* applies to claims for damages, have found that

It was for these same reasons that we held that a federal court should not entertain a declaratory judgment action aimed at adjudicating a federal issue involved in a state criminal proceeding. See *Samuels* v. *Mackell*, 401 U. S. 66, 72–73 (1971). As was true in *Samuels*, here, "the practical effect of the two forms of relief [here, damages and injunctions] will be virtually identical, and the basic policy against federal interference with pending state criminal prosecutions will be frustrated as much by a declaratory judgment [or, I believe, a damages award] as it would be by an injunction." See *id.*, at 73. Under *Samuels*, for example, if a state criminal prosecution is ongoing, a federal court cannot adjudicate a plaintiff's request for a declaration that evidence being used in that prosecution was seized contrary to the Fourth Amendment. Yet if *Younger* does not apply to damages claims, that same court in the same circumstances *could* rule the search unconstitutional as long as the federal plaintiff was seeking damages *in addition to* a determination of the unconstitutionality of the seizure—a prerequisite of any damages award. Why the latter action should be considered *less* problematic for purposes of comity or "Our Federalism" escapes me. If anything, I would have thought just the opposite would be true.

In light of the developments in this case and our decisions in *Younger* and *Samuels*, it is clear that the District Court should not dismiss the damages claims, yet must not proceed to judgment on them either. Consequently, I would couple our remand of this case with a holding that, pursuant to *Younger*, the lower courts *may not* adjudicate respondents'

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many of the same considerations which suggest that a federal plaintiff should not be able to enjoin ongoing state criminal proceedings also militate against a damages award to a similarly situated federal plaintiff. See, *e. g.*, *Mann* v. *Jett*, *supra*, at 1449; *Parkhurst* v. *State*, *supra*, at 777; *Guerro* v. *Mulhearn*, 498 F. 2d, at 1251–1252.

damages claims until the conclusion of the pending state criminal proceedings.[5]

[5] While three of the respondents have been indicted, three others have not. See *ante*, at 198, and n. 1. Even if *Younger* does not apply to their claims for damages, the District Court would be prudent, under *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800 (1976), to stay the adjudication of these claims—virtually indistinguishable from the substance of the ongoing state criminal proceedings involving the other respondents—as well.

Syllabus

YATES *v.* AIKEN, WARDEN, ET AL.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

No. 86–6060. Argued December 2, 1987—Decided January 12, 1988

Petitioner was tried in state court on charges of murder and armed robbery stemming from a 1981 store robbery during which his accomplice and the storekeeper's mother were killed in a fight after petitioner left the store. Although petitioner testified that the mother had not even entered the store before he left and that he had not intended to kill or harm anyone, the jury was instructed "that malice is implied or presumed from the use of a deadly weapon." After his conviction and death sentence were affirmed by the South Carolina Supreme Court, petitioner sought a writ of habeas corpus from that court, arguing, *inter alia*, that the burden-shifting instruction given at trial was unconstitutional under *Sandstrom* v. *Montana*, 442 U. S. 510. While the habeas corpus application was pending, petitioner also called to the state court's attention this Court's subsequent decision in *Francis* v. *Franklin*, 471 U. S. 307. After this Court summarily vacated the state court's summary denial of the writ and remanded the case "for further consideration in light of *Francis*," the state court, although acknowledging that the jury instruction suffered from the same infirmities addressed in *Francis*, denied relief on state-law grounds without considering whether *Francis* might apply retroactively and without discussing *Sandstrom*.

Held: As a matter of federal law, petitioner's conviction cannot stand in light of *Francis*. Pp. 215–218.

(a) *Sandstrom*, which had been decided before petitioner's trial took place, established that the Due Process Clause of the Fourteenth Amendment prohibits jury instructions that have the effect of relieving the State of its burden of proof on the critical question of intent in a criminal prosecution. *Francis* was merely an application of that governing principle. Accordingly, respondents' argument that a newly announced constitutional rule should not generally be applied retroactively to cases pending on collateral review cannot operate to deny petitioner the benefit of *Francis*. That argument simply does not apply where the "new" holding is merely an application of a rule that was well settled at the time of conviction. Pp. 215–217.

(b) The State's contention that it has the authority to establish the scope of its own habeas corpus proceedings and to refuse therein to apply a new rule of federal constitutional law retroactively is rejected since *Francis* did not announce a new rule and since the state court's opinion

does not place any limit on the issues it will entertain in collateral proceedings. Having considered the merits of the federal claim, that court has the duty to grant the relief that federal law requires. Pp. 217–218.

290 S. C. 231, 349 S. E. 2d 84, reversed and remanded.

STEVENS, J., delivered the opinion for a unanimous Court.

David I. Bruck argued the cause and filed briefs for petitioner.

Donald J. Zelenka, Chief Deputy Attorney General of South Carolina, argued the cause for respondents. With him on the brief was *T. Travis Medlock*, Attorney General.

JUSTICE STEVENS delivered the opinion of the Court.

Petitioner and an accomplice robbed a country store in South Carolina in 1981. After petitioner left the store, a fight occurred in which the accomplice and the storekeeper's mother were both killed. Petitioner was convicted of murder and armed robbery and sentenced to death. His conviction and sentence were affirmed by the South Carolina Supreme Court in 1982. *State* v. *Yates*, 280 S. C. 29, 310 S. E. 2d 805, cert. denied, 462 U. S. 1124 (1983).

At his trial, petitioner testified that the victim had not even entered the store before he left and that he had not intended to kill or to harm anyone. The jury, however, was instructed "that malice is implied or presumed from the use of a deadly weapon."[1] A few months after petitioner's conviction was affirmed, the South Carolina Supreme Court held that it was error to give such an instruction. See *State* v. *Elmore*, 279 S. C. 417, 308 S. E. 2d 781 (1983). Thereafter, petitioner sought a writ of habeas corpus from the South Carolina Supreme Court, arguing that the burden-shifting instruction given at his trial was unconstitutional under the state court's reasoning in *Elmore* and under our decision in *Sandstrom* v. *Montana*, 442 U. S. 510 (1979). While the application for habeas corpus was pending, we decided an-

[1] See App. 7; Tr. 1208.

other case involving a burden-shifting instruction, *Francis* v. *Franklin*, 471 U. S. 307 (1985), and petitioner promptly called that decision to the attention of the State Supreme Court. The court denied the writ without opinion.

Petitioner then sought a writ of certiorari in this Court. We summarily vacated the judgment of the South Carolina Supreme Court and remanded the case "for further consideration in light of *Francis* v. *Franklin*." *Yates* v. *Aiken*, 474 U. S. 896 (1985). On remand, the state court determined that the jury instruction at petitioner's trial "suffered from the same infirmities present in *Elmore* and addressed in *Francis* v. *Franklin*." 290 S. C. 231, 233, 349 S. E. 2d 84, 85 (1986). Nevertheless, the court held that petitioner was not entitled to relief. As an explanation for its holding, the court stated that its decision in *Elmore* should not be applied retroactively to invalidate a conviction that was final when *Elmore* was decided. The opinion did not consider whether the decision in *Francis* v. *Franklin* might apply retroactively and also did not discuss our decision in *Sandstrom* v. *Montana*, on which petitioner had relied.

In dissent, Justice Finney reasoned that *Elmore* and *Francis* v. *Franklin* should be applied retroactively because an instruction that shifts the burden of proof on an element of the offense—particularly in a capital case—substantially impairs the truth-finding function of the jury. Moreover, he reasoned, given our decision in *Sandstrom* v. *Montana* in 1979, the case did not represent a significant change in the law.[2]

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[2] "The doctrine against burden shifting presumptions set out in *Francis* v. *Franklin*, [471 U. S. 307 (1985)], is not a clear break with prior law. The United States Supreme Court in *Sandstrom* v. *Montana*, 442 U. S. 510 . . . (1979), decided prior to *Yates*, held that conclusive presumptions or instructions which shift the burden of persuasion violate the Fourteenth Amendment's requirement that in every criminal trial, the state is required to prove each element of the criminal offense beyond a reasonable doubt. The Court went on to hold, concerning *Elmore*-type errors, that conclusive presumptions conflict with the presumption of innocence with which the law endows the accused. These presumptions, likewise, extend

We granted certiorari because we were concerned that the South Carolina Supreme Court had not fully complied with our mandate. 480 U. S. 945 (1987). We now reverse.

I

Our order remanding the case for further consideration in the light of *Francis* v. *Franklin* was predicated entirely on the fact that petitioner's challenge to the jury instruction asserted a substantial federal question. Our opinion in *Francis* explained why a challenge of this kind is supported by the Federal Constitution:

> "The Due Process Clause of the Fourteenth Amendment 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' *In re Winship*, [397 U. S. 358, 364 (1970)]. This 'bedrock, "axiomatic and elementary" [constitutional] principle,' *id.*, at 363, prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime. *Sandstrom* v. *Montana*, *supra*, at 520–524; *Patterson* v. *New York*, 432 U. S. 197, 210, 215 (1977); *Mullaney* v. *Wilbur*, 421 U. S. 684, 698–701 (1975); see also *Morissette* v. *United States*, 342 U. S. 246, 274–275 (1952). The prohibition protects the 'fundamental value determination of our society,' given voice in Justice Harlan's concurrence in *Winship*, that 'it is far worse to convict an innocent man than to let a guilty man go free.' 397 U. S., at 372. See *Speiser* v. *Randall*, 357 U. S. 513, 525–526 (1958)." 471 U. S., at 313.

The portion of the state court's opinion concluding that the instruction in petitioner's case was infirm for the reasons "ad-

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to every element of the crime and invade the truth-finding function which, in a criminal case, the law assigns solely to the jury." 290 S. C., at 239, 349 S. E. 2d, at 88–89.

dressed in *Francis*" was responsive to our mandate, but the discussion of the question whether the decision in *Elmore* should be applied retroactively was not. Our mandate contemplated that the state court would consider whether, as a matter of federal law, petitioner's conviction could stand in the light of *Francis*. Since the state court did not decide that question, we shall do so.

II

The South Carolina Attorney General submits that we should adopt Justice Harlan's theory that a newly announced constitutional rule should not be applied retroactively to cases pending on collateral review unless the rule places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," *Mackey* v. *United States*, 401 U. S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part), or enunciates a procedural rule that is "implicit in the concept of ordered liberty," *id.*, at 693. Under this theory, the Attorney General argues, petitioner would not be entitled to the benefit of our ruling in *Franklin*.

We have already endorsed Justice Harlan's retroactivity analysis for cases pending on direct appeal, see *Griffith* v. *Kentucky*, 479 U. S. 314, 322 (1987); *United States* v. *Johnson*, 457 U. S. 537 (1982), and we have noted, as Justice Harlan did, *Mackey*, *supra*, at 682–687; *Desist* v. *United States*, 394 U. S. 244, 260 (1969) (Harlan, J., dissenting), the important distinction between direct review and collateral review. Compare *Allen* v. *Hardy*, 478 U. S. 255 (1986) (holding that *Batson* v. *Kentucky*, 476 U. S. 79 (1986) does not apply retroactively to cases on collateral review), with *Griffith*, *supra*, at 322–323 (holding that *Batson* does apply retroactively to cases pending on direct review); see, *e. g.*, *Pennsylvania* v. *Finley*, 481 U. S. 551 (1987) (right to appointed counsel on direct appeal not applicable in collateral proceedings). To decide this case, however, it is not neces-

sary to determine whether we should go further and adopt Justice Harlan's reasoning as to the retroactivity of cases announcing new constitutional rules to cases pending on collateral review.

Although Justice Harlan believed that most collateral attacks on final judgments should be resolved by reference to the state of the law at the time of the petitioner's conviction, he emphasized the proposition that many "new" holdings are merely applications of principles that were well settled at the time of conviction. As he explained in *Desist:*

> "The theory that the habeas petitioner is entitled to the law prevailing at the time of his conviction is, however, one which is more complex than the Court has seemingly recognized. First, it is necessary to determine whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law. . . . One need not be a rigid partisan of Blackstone to recognize that many, though not all, of this Court's constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation. In such a context it appears very difficult to argue against the application of the 'new' rule in all habeas cases since one could never say with any assurance that this Court would have ruled differently at the time the petitioner's conviction became final." 394 U. S., at 263–264.

This reasoning, which we previously have endorsed,[3] is controlling in this case because our decision in *Francis* was

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[3] We stated in *United States* v. *Johnson*, 457 U. S. 537, 549 (1982):

"[W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether

merely an application of the principle that governed our decision in *Sandstrom* v. *Montana*, which had been decided before petitioner's trial took place. We explicitly so held in *Francis* itself:

> "The question before the Court in this case is almost identical to that before the Court in *Sandstrom:* whether the challenged jury instruction had the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of . . . state of mind,' 442 U. S., at 521, by creating a mandatory presumption of intent upon proof by the State of other elements of the offense." 471 U. S., at 313.
>
> "*Sandstrom* v. *Montana* made clear that the Due Process Clause of the Fourteenth Amendment prohibits the State from making use of jury instructions that have the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of intent in a criminal prosecution. 442 U. S., at 521. Today we reaffirm the rule of *Sandstrom* and the wellspring due process principle from which it was drawn. The Court of Appeals faithfully and correctly applied this rule, and the court's judgment is therefore affirmed." *Id.*, at 326–327.

III

Respondents also argue that South Carolina has the authority to establish the scope of its own habeas corpus proceedings and to refuse to apply a new rule of federal constitutional law retroactively in such a proceeding. We reject this argument for two reasons. First, as we have just ex-

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the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way."

See also *Truesdale* v. *Aiken*, 480 U. S. 527 (1987) *(per curiam)*; *Dunaway* v. *New York*, 442 U. S. 200 (1979); *Lee* v. *Missouri*, 439 U. S. 461, 462 (1979) *(per curiam)*.

plained, *Francis* did not announce a new rule. Second, we do not read the South Carolina Supreme Court's opinion as having placed any limit on the issues that it will entertain in collateral proceedings. Since it has considered the merits of the federal claim, it has a duty to grant the relief that federal law requires.

The judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

FORRESTER *v.* WHITE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 86–761. Argued November 2, 1987—Decided January 12, 1988

Respondent, an Illinois state-court judge, had authority under state law to appoint and discharge probation officers. After hiring petitioner as a probation officer and later promoting her, respondent demoted and then discharged her. Petitioner filed a damages action in Federal District Court under 42 U. S. C. § 1983, alleging that she was demoted and discharged on account of her sex in violation of the Equal Protection Clause of the Fourteenth Amendment. Although the jury found in her favor, the court granted summary judgment to respondent on the ground that he was entitled to absolute immunity from a civil damages suit. The Court of Appeals affirmed.

Held: A state-court judge does not have absolute immunity from a damages suit under § 1983 for his decisions to demote and dismiss a court employee. Pp. 223–230.

(a) Because the threat of personal liability for damages can inhibit government officials in the proper performance of their duties, various forms of official immunity from suit have been created. Aware, however, that the threat of such liability may also have the salutary effect of encouraging officials to perform their duties in a lawful and appropriate manner, this Court has been cautious in recognizing absolute immunity claims other than those decided by constitutional or statutory enactment. Accordingly, the Court has applied a "functional" approach under which the nature of the functions entrusted to particular officials is examined in order to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions. Even with respect to constitutional immunities granted for certain functions of Congress and the President, the Court has been careful not to extend the scope of protection further than its purposes require. Pp. 223–225.

(b) Judges have long enjoyed absolute immunity from liability in damages for their judicial or adjudicatory acts, primarily in order to protect judicial independence by insulating judges from vexatious actions by disgruntled litigants. Truly judicial acts, however, must be distinguished from the administrative, legislative, or executive functions that judges may occasionally be assigned by law to perform. It is the nature of the function performed—adjudication—rather than the identity of the actor

who performed it—a judge—that determines whether absolute immunity attaches to the act. Pp. 225–229.

(c) Respondent's decisions to demote and discharge petitioner were administrative rather than judicial or adjudicative in nature. Such decisions are indistinguishable from those of an executive branch official responsible for making similar personnel decisions, which, no matter how crucial to the efficient operation of public institutions, are not entitled to absolute immunity from liability in damages under § 1983. The Court of Appeals reasoned that the threat of vexatious lawsuits by disgruntled ex-employees could interfere with the quality of a judge's decisions. However true this may be, it does not serve to distinguish judges from other public officials who hire and fire subordinates. In neither case is the danger that officials will be deflected from the effective performance of their duties great enough to justify absolute immunity. This does not imply that qualified immunity, like that available to executive branch officials who make similar discretionary decisions, is unavailable to judges for their employment decisions, a question not decided here. Pp. 229–230.

792 F. 2d 647, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, MARSHALL, STEVENS, and SCALIA, JJ., joined, and in all but Part II of which BLACKMUN, J., joined.

Mary Anne Sedey argued the cause and filed briefs for petitioner.

Rosalyn B. Kaplan, Assistant Attorney General of Illinois, argued the cause for respondent. With her on the brief were *Neil F. Hartigan*, Attorney General, and *Roma Jones Stewart*, Solicitor General.*

JUSTICE O'CONNOR delivered the opinion of the Court.†

This case requires us to decide whether a state-court judge has absolute immunity from a suit for damages under 42 U. S. C. § 1983 for his decision to dismiss a subordinate court employee. The employee, who had been a probation officer, alleged that she was demoted and discharged on account of

Brian L. Crowe filed a brief for the Illinois Judges Association as *amicus curiae* urging affirmance.

†JUSTICE BLACKMUN joins in all but Part II of this opinion.

her sex, in violation of the Equal Protection Clause of the Fourteenth Amendment. We conclude that the judge's decisions were not judicial acts for which he should be held absolutely immune.

I

Respondent Howard Lee White served as Circuit Judge of the Seventh Judicial Circuit of the State of Illinois and Presiding Judge of the Circuit Court in Jersey County. Under Illinois law, Judge White had the authority to hire adult probation officers, who were removable in his discretion. Ill. Rev. Stat., ch. 38, ¶204–1 (1979). In addition, as designee of the Chief Judge of the Seventh Judicial Circuit, Judge White had the authority to appoint juvenile probation officers to serve at his pleasure. Ill. Rev. Stat., ch. 37, ¶706–5 (1979).

In April 1977, Judge White hired petitioner Cynthia A. Forrester as an adult and juvenile probation officer. Forrester prepared presentence reports for Judge White in adult offender cases, and recommendations for disposition and placement in juvenile cases. She also supervised persons on probation and recommended revocation when necessary. In July 1979, Judge White appointed Forrester as Project Supervisor of the Jersey County Juvenile Court Intake and Referral Services Project, a position that carried increased supervisory responsibilities. Judge White demoted Forrester to a nonsupervisory position in the summer of 1980. He discharged her on October 1, 1980.

Forrester filed this lawsuit in the United States District Court for the Southern District of Illinois in July 1982. She alleged violations of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. §2000e *et seq.*, and §1 of the Civil Rights Act of 1871, Rev. Stat. §1979, as amended, 42 U. S. C. §1983. A jury found that Judge White had discriminated against Forrester on account of her sex, in violation of the Equal Protection Clause of the Fourteenth Amendment. The jury awarded her $81,818.80 in

compensatory damages under § 1983. Forrester's other claims were dismissed in the course of the lawsuit.

After Judge White's motion for judgment notwithstanding the verdict was denied, he moved for a new trial. The District Court granted this motion, holding that the jury verdict was against the weight of the evidence. Judge White then moved for summary judgment on the ground that he was entitled to "judicial immunity" from a civil damages suit. This motion, too, was granted. Forrester appealed.

A divided panel of the Court of Appeals for the Seventh Circuit affirmed the grant of summary judgment. The majority reasoned that judges are immune for activities implicating the substance of their decisions in the cases before them, although they are not shielded "from the trials of life generally." 792 F. 2d 647, 652 (1986). Some members of a judge's staff aid in the performance of adjudicative functions, and the threat of suits by such persons could make a judge reluctant to replace them even after losing confidence in their work. This could distort the judge's decisionmaking and thereby indirectly affect the rights of litigants. Here, Forrester performed functions that were "inextricably tied to discretionary decisions that have consistently been considered judicial acts." *Id.*, at 657. Unless Judge White felt free to replace Forrester, the majority thought, the quality of his own decisions might decline. The Court of Appeals therefore held that Judge White was absolutely immune from Forrester's civil damages suit. In view of this holding, the court found it unnecessary to decide whether the District Court had erred in granting Judge White's motion for a new trial.

In dissent, Judge Posner argued that judicial immunity should protect only adjudicative functions, and that employment decisions are administrative functions for which judges should not be given absolute immunity.

In *Goodwin* v. *Circuit Court of St. Louis County, Mo.*, 729 F. 2d 541, 549, cert. denied, 469 U. S. 828 (1984), the United

States Court of Appeals for the Eighth Circuit held that a judge was not immune from civil damages for his decision to demote a hearing officer. We granted certiorari, 479 U. S. 1083 (1987), to resolve the conflict.

II

Suits for monetary damages are meant to compensate the victims of wrongful actions and to discourage conduct that may result in liability. Special problems arise, however, when government officials are exposed to liability for damages. To the extent that the threat of liability encourages these officials to carry out their duties in a lawful and appropriate manner, and to pay their victims when they do not, it accomplishes exactly what it should. By its nature, however, the threat of liability can create perverse incentives that operate to *inhibit* officials in the proper performance of their duties. In many contexts, government officials are expected to make decisions that are impartial or imaginative, and that above all are informed by considerations other than the personal interests of the decisionmaker. Because government officials are engaged by definition in governing, their decisions will often have adverse effects on other persons. When officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct. In this way, exposing government officials to the same legal hazards faced by other citizens may detract from the rule of law instead of contributing to it.

Such considerations have led to the creation of various forms of immunity from suit for certain government officials. Aware of the salutary effects that the threat of liability can have, however, as well as the undeniable tension between official immunities and the ideal of the rule of law, this Court has been cautious in recognizing claims that government offi-

cials should be free of the obligation to answer for their acts in court. Running through our cases, with fair consistency, is a "functional" approach to immunity questions other than those that have been decided by express constitutional or statutory enactment. Under that approach, we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions. Officials who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy, and the Court has recognized a category of "qualified" immunity that avoids unnecessarily extending the scope of the traditional concept of absolute immunity. See, *e. g.*, *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974); *Butz* v. *Economou*, 438 U. S. 478 (1978); *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982).

This Court has generally been quite sparing in its recognition of claims to absolute official immunity. One species of such legal protection is beyond challenge: the legislative immunity created by the Speech or Debate Clause, U. S. Const., Art. I, § 6, cl. 1. Even here, however, the Court has been careful not to extend the scope of the protection further than its purposes require. See, *e. g.*, *Gravel* v. *United States*, 408 U. S. 606, 622–627 (1972); see also *Hutchinson* v. *Proxmire*, 443 U. S. 111, 123–133 (1979); *Doe* v. *McMillan*, 412 U. S. 306 (1973); *United States* v. *Brewster*, 408 U. S. 501 (1972); *United States* v. *Johnson*, 383 U. S. 169 (1966); *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881). Furthermore, on facts analogous to those in the case before us, the Court indicated that a United States Congressman would not be entitled to absolute immunity, in a sex-discrimination suit filed by a personal aide whom he had fired, unless such immunity was afforded by the Speech or Debate Clause. *Davis* v. *Passman*, 442 U. S. 228, 246 (1979); see also *id.*, at 246, n. 25 (reserving question of qualified immunity).

Among executive officials, the President of the United States is absolutely immune from damages liability arising from official acts. *Nixon* v. *Fitzgerald*, 457 U. S. 731 (1982). This immunity, however, is based on the President's "unique position in the constitutional scheme," *id.*, at 749, and it does not extend indiscriminately to the President's personal aides, see *Harlow*, *supra*, or to Cabinet level officers, *Mitchell* v. *Forsyth*, 472 U. S. 511 (1985). Nor are the highest executive officials in the States protected by absolute immunity under federal law. See *Scheuer* v. *Rhodes*, *supra*.

III

As a class, judges have long enjoyed a comparatively sweeping form of immunity, though one not perfectly well defined. Judicial immunity apparently originated, in medieval times, as a device for discouraging collateral attacks and thereby helping to establish appellate procedures as the standard system for correcting judicial error. See Block, *Stump v. Sparkman* and the History of Judicial Immunity, 1980 Duke L. J. 879. More recently, this Court found that judicial immunity was "the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country." *Bradley* v. *Fisher*, 13 Wall. 335, 347 (1872). Besides protecting the finality of judgments or discouraging inappropriate collateral attacks, the *Bradley* Court concluded, judicial immunity also protected judicial independence by insulating judges from vexatious actions prosecuted by disgruntled litigants. *Id.*, at 348.

In the years since *Bradley* was decided, this Court has not been quick to find that federal legislation was meant to diminish the traditional common-law protections extended to the judicial process. See, *e. g.*, *Pierson* v. *Ray*, 386 U. S. 547 (1967). On the contrary, these protections have been held to extend to Executive Branch officials who perform quasi-judicial functions, see *Butz* v. *Economou*, *supra*, at 513–514,

or who perform prosecutorial functions that are "intimately associated with the judicial phase of the criminal process," *Imbler* v. *Pachtman*, 424 U. S. 409, 430 (1976). The common law's rationale for these decisions—freeing the judicial process of harassment or intimidation—has been thought to require absolute immunity even for advocates and witnesses. See *Briscoe* v. *LaHue*, 460 U. S. 325 (1983); *Butz* v. *Economou*, 438 U. S., at 512.

One can reasonably wonder whether judges, who have been primarily responsible for developing the law of official immunities, are not inevitably more sensitive to the ill effects that vexatious lawsuits can have on the judicial function than they are to similar dangers in other contexts. Cf. *id.*, at 528, n. (REHNQUIST, J., concurring in part and dissenting in part). Although Congress has not undertaken to cut back the judicial immunities recognized by this Court, we should be at least as cautious in extending those immunities as we have been when dealing with officials whose peculiar problems we know less well than our own. At the same time, we cannot pretend that we are writing on a clean slate or that we should ignore compelling reasons that may well justify broader protections for judges than for some other officials.

The purposes served by judicial immunity from liability in damages have been variously described. In *Bradley* v. *Fisher*, *supra*, at 348, and again in *Pierson* v. *Ray*, *supra*, at 554, the Court emphasized that the nature of the adjudicative function requires a judge frequently to disappoint some of the most intense and ungovernable desires that people can have. As Judge Posner pointed out in his dissenting opinion below, this is the principal characteristic that adjudication has in common with legislation and with criminal prosecution, which are the two other areas in which absolute immunity has most generously been provided. 792 F. 2d, at 660. If judges were personally liable for erroneous decisions, the resulting avalanche of suits, most of them frivolous but vexatious,

would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits. *Id.*, at 660–661. The resulting timidity would be hard to detect or control, and it would manifestly detract from independent and impartial adjudication. Nor are suits against judges the only available means through which litigants can protect themselves from the consequences of judicial error. Most judicial mistakes or wrongs are open to correction through ordinary mechanisms of review, which are largely free of the harmful side-effects inevitably associated with exposing judges to personal liability.

When applied to the paradigmatic judicial acts involved in resolving disputes between parties who have invoked the jurisdiction of a court, the doctrine of absolute judicial immunity has not been particularly controversial. Difficulties have arisen primarily in attempting to draw the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges. Here, as in other contexts, immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches.

This Court has never undertaken to articulate a precise and general definition of the class of acts entitled to immunity. The decided cases, however, suggest an intelligible distinction between judicial acts and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform. Thus, for example, the informal and *ex parte* nature of a proceeding has not been thought to imply that an act otherwise within a judge's lawful jurisdiction was deprived of its judicial character. See *Stump* v. *Sparkman*, 435 U. S. 349, 363, n. 12 (1978). Similarly, acting to disbar an attorney as a sanction for contempt of court, by invoking a power "possessed by all courts which have authority to admit attorneys to practice," does not become less judicial by virtue of an allegation of malice or corruption of motive. *Bradley* v. *Fisher*, 13 Wall., at 354.

As the *Bradley* Court noted: "Against the consequences of [judges'] erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort." *Ibid.*

Administrative decisions, even though they may be essential to the very functioning of the courts, have not similarly been regarded as judicial acts. In *Ex parte Virginia*, 100 U. S. 339 (1880), for example, this Court declined to extend immunity to a county judge who had been charged in a criminal indictment with discriminating on the basis of race in selecting trial jurors for the county's courts. The Court reasoned:

> "Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge. . . . That the jurors are selected for a court makes no difference. So are court-criers, tipstaves, sheriffs, &c. Is their election or their appointment a judicial act?" *Id.*, at 348.

Although this case involved a criminal charge against a judge, the reach of the Court's analysis was not in any obvious way confined by that circumstance.

Likewise, judicial immunity has not been extended to judges acting to promulgate a code of conduct for attorneys. *Supreme Court of Virginia* v. *Consumers Union of United States, Inc.*, 446 U. S. 719 (1980). In explaining why legislative, rather than judicial, immunity furnished the appropriate standard, we said: "Although it is clear that under Virginia law the issuance of the Bar Code was a proper function of the Virginia Court, propounding the Code was not an act of adjudication but one of rulemaking." *Id.*, at 731. Similarly, in the same case, we held that judges acting to enforce the Bar Code would be treated like prosecutors, and thus would

be amenable to suit for injunctive and declaratory relief. *Id.*, at 734–737. Cf. *Pulliam* v. *Allen*, 466 U. S. 522 (1984). Once again, it was the nature of the function performed, not the identity of the actor who performed it, that informed our immunity analysis.

IV

In the case before us, we think it clear that Judge White was acting in an administrative capacity when he demoted and discharged Forrester. Those acts—like many others involved in supervising court employees and overseeing the efficient operation of a court—may have been quite important in providing the necessary conditions of a sound adjudicative system. The decisions at issue, however, were not themselves judicial or adjudicative. As Judge Posner pointed out below, a judge who hires or fires a probation officer cannot meaningfully be distinguished from a district attorney who hires and fires assistant district attorneys, or indeed from any other Executive Branch official who is responsible for making such employment decisions. Such decisions, like personnel decisions made by judges, are often crucial to the efficient operation of public institutions (some of which are at least as important as the courts), yet no one suggests that they give rise to absolute immunity from liability in damages under § 1983.

The majority below thought that the threat of vexatious lawsuits by disgruntled ex-employees could interfere with the quality of a judge's decisions:

> "The evil to be avoided is the following: A judge loses confidence in his probation officer, but hesitates to fire him because of the threat of litigation. He then retains the officer, in which case the parties appearing before the court are the victims, because the quality of the judge's decision-making will decline." 792 F. 2d, at 658.

There is considerable force in this analysis, but it in no way serves to distinguish judges from other public officials who

hire and fire subordinates. Indeed, to the extent that a judge is less free than most Executive Branch officials to delegate decisionmaking authority to subordinates, there may be somewhat less reason to cloak judges with absolute immunity from such suits than there would be to protect such other officials. This does not imply that qualified immunity, like that available to Executive Branch officials who make similar discretionary decisions, is unavailable to judges for their employment decisions. See, *e. g.*, *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974); *Davis* v. *Scherer*, 468 U. S. 183 (1984). Cf. *Harlow* v. *Fitzgerald*, 457 U. S., at 818. Absolute immunity, however, is "strong medicine, justified only when the danger of [officials' being] deflect[ed from the effective performance of their duties] is very great." 792 F. 2d, at 660 (Posner, J., dissenting). The danger here is not great enough. Nor do we think it significant that, under Illinois law, only a judge can hire or fire probation officers. To conclude that, because a judge acts within the scope of his authority, such employment decisions are brought within the court's "jurisdiction," or converted into "judicial acts," would lift form above substance. Under Virginia law, only that State's judges could promulgate and enforce a Bar Code, but we nonetheless concluded that neither function was judicial in nature. See *Supreme Court of Virginia* v. *Consumers Union*, *supra*.

We conclude that Judge White was not entitled to absolute immunity for his decisions to demote and discharge Forrester. In so holding, we do not decide whether Judge White is entitled to a new trial, or whether he may be able to claim a qualified immunity for the acts complained of in Forrester's suit. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

LOWENFIELD *v.* PHELPS, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 86–6867. Argued October 14, 1987—Decided January 13, 1988

At petitioner's state-court trial on charges of killing five people, the jury returned guilty verdicts on three counts of first-degree murder, an essential statutory element of which, under the circumstances, was a finding of intent "to kill or inflict great bodily harm upon more than one person." At the penalty phase, in response to notes from the jury indicating difficulty in reaching a decision, the court twice polled the jury as to whether further deliberations would be helpful in reaching a verdict, a majority of the jurors answering affirmatively in each instance. After the second poll, the judge reiterated earlier instructions, declaring that he would impose a sentence of life imprisonment without benefit of probation, parole, or suspended sentence if the jurors were unable to reach a unanimous recommendation, and admonishing them to consult and consider each other's views with the objective of reaching a verdict, but not to surrender their own honest beliefs in doing so. Defense counsel did not object to either poll, to the manner in which they were conducted, or to the supplemental instruction. The jury then returned a verdict in 30 minutes, sentencing petitioner to death on all three first-degree murder counts upon finding the statutory aggravating circumstance of "knowingly creat[ing] a risk of death or great bodily harm to more than one person." After the Louisiana Supreme Court upheld petitioner's convictions and sentences, the Federal District Court denied him habeas corpus relief and the Court of Appeals affirmed.

Held:

1. When considered in context and under all the circumstances, the two jury polls and the supplemental charge did not impermissibly coerce the jury to return a death sentence. The supplemental charge is similar to the traditional *Allen* charge long approved by this Court on the ground that it is an attempt to secure jury unanimity, which reasoning applies with even greater force here since this charge does not speak specifically to the minority jurors. Although not without constitutional weight, the fact that one of the purposes served by such a charge—the avoidance of the societal costs of a retrial—is not present here because Louisiana law requires the court to impose a life sentence if the jury is hung, does not render the charge impermissible under the Due Process

Clause and the Eighth Amendment in light of the State's strong interest in having capital sentencing juries express the conscience of the community on the ultimate question of life or death. *Jenkins* v. *United States*, 380 U. S. 445, and *United States* v. *United States Gypsum Co.*, 438 U. S. 422, cannot aid petitioner since the supplemental instruction given in this case did not require the jury to reach a decision. Similarly, *Brasfield* v. *United States*, 272 U. S. 448, cannot help petitioner, since the questions asked the jury here did not require it to reveal the nature or extent of its division on the merits. Although coercion is suggested by the fact that the jury returned its verdict soon after receiving the supplemental instruction, defense counsel's failure to object to either the polls or the instruction at the time indicates that the potential for coercion argued now was not then apparent. Pp. 237–241.

2. The death sentence does not violate the Eighth Amendment simply because the single statutory "aggravating circumstance" found by the jury duplicates an element of the underlying offense of first-degree murder. To pass constitutional muster, a capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant* v. *Stephens*, 462 U. S. 862, 877; cf. *Gregg* v. *Georgia*, 428 U. S. 153. This narrowing function may constitutionally be provided in either of two ways: The legislature may broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase, as most States have done, *or* the legislature may itself narrow the definition of capital offenses so that the jury finding at the guilt phase responds to this concern, as Louisiana has done here. See *Jurek* v. *Texas*, 428 U. S. 262. Thus, the duplicative nature of the statutory aggravating circumstance did not render petitioner's sentence infirm, since the constitutionally mandated narrowing function was performed at the guilt phase and the Constitution did not require an additional aggravating circumstance finding at the penalty phase. Pp. 241–246.

817 F. 2d 285, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, O'CONNOR, and SCALIA, JJ., joined, and in Part III of which, except for the last sentence thereof, STEVENS, J., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, and in Part I of which STEVENS, J., joined, *post*, p. 246.

David Klingsberg argued the cause for petitioner. With him on the briefs was *Gary S. Guzy*.

John M. Mamoulides argued the cause for respondents. With him on the brief were *William J. Guste, Jr.*, Attorney General of Louisiana, and *Dorothy A. Pendergast.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.†

Petitioner, sentenced to death by the Louisiana state courts, makes two federal constitutional attacks on his sentence. He first contends that the trial court impermissibly coerced the jury to return a sentence of death by inquiries it made to the jury and a supplemental charge which it gave to the jury following the receipt of a communication from that body. Petitioner's second contention is that the death sentence violates the Eighth Amendment to the United States Constitution because the single "aggravating circumstance" found by the jury and upheld by the Supreme Court of Louisiana merely duplicates an element of the underlying offense of first-degree murder of which he was convicted at the guilt stage. We reject both of these contentions.

I

Petitioner was charged with killing a woman with whom he had lived, three members of her family, and one of her male friends. The jury found petitioner guilty of two counts of manslaughter and three counts of first-degree murder; an essential element of the latter verdicts was a finding that petitioner intended "to kill or inflict great bodily harm upon more than one person." La. Rev. Stat. Ann. § 14:30A(3) (West 1986).

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*Briefs of *amicus curiae* urging affirmance were filed for the United States by *Solicitor General Fried, Assistant Attorney General Weld, Deputy Solicitor General Bryson, Paul J. Larkin, Jr.*, and *Sara Criscitelli;* and for the State of Arkansas by *J. Steven Clark*, Attorney General, and *Clint Miller*, Assistant Attorney General.

†JUSTICE STEVENS joins Part III of this opinion, except for the last sentence.

The jury commenced its sentencing deliberations on the same day that it returned the verdict of guilt, and the judge's charge to them in this second phase of the trial included the familiar admonition that the jurors should consider the views of others with the objective of reaching a verdict, but that they should not surrender their own honest beliefs in doing so. The court also charged the jury that if it were unable to reach a unanimous recommendation, the court would impose a sentence of life imprisonment without the possibility of probation, parole, or suspension of sentence.

The jury was allowed to retire late in the evening, and reconvene the next day. During the afternoon of that day a note came from the foreman of the jury stating that the jury was unable to reach a decision at that time, and requesting that the court again advise the jury as to its responsibilities. The jury was called back. The court provided a piece of paper to each juror and asked each to write on the paper his or her name and the answer to the question whether "further deliberations would be helpful in obtaining a verdict." The jurors complied, and were asked to retire to the jury room. The papers revealed eight answers in the affirmative—that more deliberation would be helpful—and four in the negative. Defense counsel renewed a previously made motion for a mistrial, arguing that the jury was obviously hung. The trial court denied the motion, noting that this was the first sign that the jury was having trouble reaching a verdict in the penalty phase. The court directed that as previously agreed upon the jury would return to the courtroom and be instructed again as to its obligations in reaching a verdict.

When the jurors returned to the courtroom a new note from them was given to the judge. This note stated that some of the jurors had misunderstood the question previously asked. The judge polled the jury again using the same method but changing the question slightly; the judge asked, "Do you feel that any further deliberations will enable you to arrive at a verdict?" App. 55. This time 11 jurors an-

swered in the affirmative and 1 in the negative. The court then reinstructed the jury:

> "Ladies and Gentlemen, as I instructed you earlier if the jury is unable to unanimously agree on a recommendation the Court shall impose the sentence of Life Imprisonment without benefit of Probation, Parole, or Suspension of Sentence.
>
> "When you enter the jury room it is your duty to consult with one another to consider each other's views and to discuss the evidence with the objective of reaching a just verdict if you can do so without violence to that individual judgment.
>
> "Each of you must decide the case for yourself but only after discussion and impartial consideration of the case with your fellow jurors. You are not advocates for one side or the other. Do not hesitate to reexamine your own views and to change your opinion if you are convinced you are wrong but do not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict." *Id.*, at 56.

Defense counsel did not object to either poll, to the manner in which the polls were conducted, or to the supplemental instruction. The jury resumed its deliberations and in 30 minutes returned with a verdict sentencing petitioner to death on all three counts of first-degree murder. In support of all three sentences, the jury found the statutory aggravating circumstance of "knowingly creat[ing] a risk of death or great bodily harm to more than one person." La. Code Crim. Proc. Ann., Art. 905.4(d) (West 1984). One death sentence was additionally supported by the aggravating circumstance that "the victim was a witness in a prosecution against the defendant. . . ." Art. 905.4(h).

On direct appeal, the Louisiana Supreme Court upheld the convictions and sentences. *State* v. *Lowenfield*, 495 So. 2d 1245 (1985), cert. denied, 476 U. S. 1153 (1986). The court

ruled that the evidence was insufficient to support the aggravating circumstance that the victim was a witness in a prosecution against the defendant, but concluded that the remaining aggravating circumstance was established by the evidence and was sufficient to support the sentences. 495 So. 2d, at 1256–1258. The court went on to hold that the trial court had not abused its discretion in declining to declare a mistrial during sentencing when the jury indicated that it was having difficulty reaching a verdict. "This court has rejected the construction that the court is required to declare a deadlock at the first sign of trouble." *Id.*, at 1259. Finally, the court rejected petitioner's argument that the judge had coerced the sentence recommendations from the jury. "It is a well settled proposition that when the court is informed by a jury that they are having difficulty in agreeing, it is not error for the court to impress upon them the importance of the case, urge them to come to agreement, and send them back for further deliberation." *Ibid.*

Subsequently petitioner sought habeas corpus from the United States District Court for the Eastern District of Louisiana. Petitioner raised, *inter alia*, the two issues now before this Court: whether a sentence of death may validly rest upon a single aggravating circumstance that is a necessary element of the underlying offense of first-degree murder, and whether the judge had coerced the sentence verdicts from the jury. The District Court denied relief and a divided panel of the United States Court of Appeals for the Fifth Circuit affirmed. 817 F. 2d 285 (1987). The panel unanimously rejected the aggravating circumstance claim. *Id.*, at 289. The majority went on to conclude: "there is no showing of coercion; the record certainly does not demonstrate coercion sufficient to render the trial fundamentally unfair." *Id.*, at 293. The dissenting judge argued that the combination of the supplemental instruction to the jury and the polling of the jury as to the usefulness of further deliberations constituted improper coercion. *Id.*, at 299–303.

II

Our review of petitioner's contention that the jury was improperly coerced requires that we consider the supplemental charge given by the trial court "in its context and under all the circumstances." *Jenkins* v. *United States*, 380 U. S. 445, 446 (1965) *(per curiam)*. The use of a supplemental charge has long been sanctioned. Nearly a century ago in *Allen* v. *United States*, 164 U. S. 492 (1896), this Court reviewed a charge similar but by no means identical to that given to the Louisiana jury here, and concluded that it was not reversible error even within the federal system. The defendant in that case had been sentenced to death by Judge Parker in the Western District of Arkansas, exercising a jurisdiction unique among federal courts. The judge's charge is not set out verbatim in the opinion of this Court, but it differed from the charge given in the present case in that the *Allen* charge urged the minority to consider the views of the majority, and ask themselves whether their own views were reasonable under the circumstances. This Court upheld the conviction and sentence against the defendant's claim of coercion, saying:

> "The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury room with a blind determination that the verdict shall represent his opinion of the case at that moment; or, that he should close his ears to the arguments of men who are equally honest and intelligent as himself." *Id.*, at 501–502.

The continuing validity of this Court's observations in *Allen* are beyond dispute, and they apply with even greater

force in a case such as this, where the charge given, in contrast to the so-called "traditional *Allen* charge," does not speak specifically to the minority jurors.[1] But in this case one of the purposes served by such a charge—the avoidance of the societal costs of a retrial—is not present because Louisiana law provides that if the jury hangs, the court shall impose a sentence of life imprisonment. La. Code Crim. Proc. Ann., Art. 905.8 (West 1984). Petitioner naturally urges that this difference makes the charge here impermissible under the Due Process Clause and the Eighth Amendment. The difference between the division of function between the jury and judge in this case and the division in *Allen* obviously weighs in the constitutional calculus, but we do not find it dispositive. The State has in a capital sentencing proceeding a strong interest in having the jury "express the conscience of the community on the ultimate question of life or death." *Witherspoon* v. *Illinois*, 391 U. S. 510, 519 (1968). Surely if the jury had returned from its deliberations after only one hour and informed the court that it had failed to achieve unanimity on the first ballot, the court would incontestably have had the authority to insist that they deliberate further. This is true even in capital cases such as this one and *Allen*, even though we are naturally mindful in such cases that the "quali-

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[1] All of the Federal Courts of Appeals have upheld some form of a supplemental jury charge. See *United States* v. *Angiulo*, 485 F. 2d 37 (CA1 1973); *United States* v. *Burke*, 700 F. 2d 70, 80 (CA2), cert. denied, 464 U. S. 816 (1983); *United States* v. *Fioravanti*, 412 F. 2d 407, 414–420 (CA3), cert. denied *sub nom. Panaccione* v. *United States*, 396 U. S. 837 (1969); *United States* v. *Sawyers*, 423 F. 2d 1335 (CA4 1970); *United States* v. *Kelly*, 783 F. 2d 575, 576–577 (CA5), cert. denied, 479 U. S. 889 (1986); *United States* v. *Scott*, 547 F. 2d 334 (CA6 1977); *United States* v. *Silvern*, 484 F. 2d 879 (CA7 1973) (en banc); *Potter* v. *United States*, 691 F. 2d 1275 (CA8 1982); *United States* v. *Bonam*, 772 F. 2d 1449, 1450 (CA9 1985); *United States* v. *McKinney*, 822 F. 2d 946 (CA10 1987); *United States* v. *Rey*, 811 F. 2d 1453 (CA11), cert. denied, 484 U. S. 830 (1987); *United States* v. *Thomas*, 146 U. S. App. D. C. 101, 449 F. 2d 1177 (1971) (en banc).

tative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978).

Petitioner relies on this Court's decision in *Jenkins* v. *United States*, *supra*,[2] but we think that case affords him no help. There the jury had sent a note to the judge to the effect that it was unable to agree upon a verdict; the judge then gave additional instructions to the jury, in the course of which he said: "'You have got to reach a decision in this case.'" *Id.*, at 446. This Court concluded that "in its context and under all the circumstances the judge's statement had the coercive effect attributed to it." *Ibid.* The difference between the language used there and the language used in the present case is sufficiently obvious to show the fallacy of petitioner's reliance. The same is true of the colloquy between the judge and the foreman of the jury in *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 459 (1978), upon which petitioner also relies.

Petitioner argues, however, that the coercive effect of the supplemental charge was exacerbated by inquiries made to the jury by the trial court. In *Brasfield* v. *United States*, 272 U. S. 448 (1926), the trial court had, after deliberations stalled, inquired as to how the jury was divided, and was informed simply that the jury stood nine to three. The jury resumed deliberations and subsequently found the defendants guilty. This Court concluded that the inquiry into the jury's numerical division necessitated reversal because it was generally coercive and almost always brought to bear "in some degree, serious although not measurable, an improper influence upon the jury." *Id.*, at 450. Although the deci-

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[2] We note that our ruling in *Jenkins* v. *United States* was based on our supervisory power over the federal courts, cf. *United States* v. *Hale*, 422 U. S. 171, 180, n. 7 (1975), and not on constitutional grounds. The *Jenkins* Court cited no provision of the Constitution, but rather relied upon other cases involving the exercise of supervisory powers. 380 U. S., at 446.

sion in *Brasfield* was an exercise of this Court's supervisory powers,[3] it is nonetheless instructive as to the potential dangers of jury polling.

Petitioner's attempt to fit the instant facts within the holding of *Brasfield* is, however, unavailing. Here the inquiry as to the numerical division of the jury was not as to how they stood on the merits of the verdict, but how they stood on the question of whether further deliberations might assist them in returning a verdict. There is no reason why those who may have been in the minority on the merits would necessarily conclude that further deliberation would not be helpful, or that those in the majority would necessarily conclude otherwise. The two questions are clearly independent of one another. We believe the type of question asked by the trial court in this case is exactly what the Court in *Brasfield* implicitly approved when it stated: "[An inquiry as to numerical division] serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division." *Ibid.*

We are mindful that the jury returned with its verdict soon after receiving the supplemental instruction, and that this suggests the possibility of coercion. *United States Gypsum Co.*, *supra*, at 462. We note, however, that defense counsel did not object to either the polls or the supplemental instruction. We do not suggest that petitioner thereby waived this issue, *Wainwright* v. *Witt*, 469 U. S. 412, 431, n. 11 (1985), but we think such an omission indicates that the potential for coercion argued now was not apparent to one on the spot.[4] *Id.*, at 430–431, and n. 11.

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[3] Our decision in *Brasfield* makes no mention of the Due Process Clause or any other constitutional provision. The Federal Courts of Appeals have uniformly rejected the notion that *Brasfield*'s *per se* reversal approach must be followed when reviewing state proceedings on habeas corpus. *E. g.*, *Williams* v. *Parke*, 741 F. 2d 847, 851 (CA6 1984), cert. denied, 470 U. S. 1029 (1985); *Locks* v. *Sumner*, 703 F. 2d 403, 405–407 (CA9), cert. denied, 464 U. S. 933 (1983).

[4] The mistrial motions referred to by the dissent, *post*, at 254, n. 3, were unrelated to the actions of the trial court—the polls and the supplemental

We hold that on these facts the combination of the polling of the jury and the supplemental instruction was not "coercive" in such a way as to deny petitioner any constitutional right. By so holding we do not mean to be understood as saying other combinations of supplemental charges and polling might not require a different conclusion. Any criminal defendant, and especially any capital defendant, being tried by a jury is entitled to the uncoerced verdict of that body. For the reasons stated we hold there was no coercion here.

III

Petitioner advances as a second ground for vacating his sentence of death that the sole aggravating circumstance found by the jury at the sentencing phase was identical to an element of the capital crime of which he was convicted. Petitioner urges that this overlap left the jury at the sentencing phase free merely to repeat one of its findings in the guilt phase, and thus not to narrow further in the sentencing phase the class of death-eligible murderers. Upon consideration of the Louisiana capital punishment scheme in the light of the decisions of this Court we reject this argument.

Louisiana has established five grades of homicide: first-degree murder, second-degree murder, manslaughter, negligent homicide, and vehicular homicide. La. Rev. Stat. Ann. § 14:29 (West 1986). Second-degree murder includes intentional murder and felony murder, and provides for punishment of life imprisonment without the possibility of parole. § 14:30.1.[5] Louisiana defines first-degree murder to include a narrower class of homicides:

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instruction—that now form the core of petitioner's argument and the dissent's attack, and there is no reason defense counsel would have been dissuaded from objecting to these latter actions because of the unsuccessful mistrial motions.

[5] "Second degree murder is the killing of a human being:

"(1) When the offender has a specific intent to kill or to inflict great bodily harm; or

"(2) When the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, ag-

"First degree murder is the killing of a human being:

"(1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery;

"(2) When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or peace officer engaged in the performance of his lawful duties;

"(3) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; or

"(4) When the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing.

"(5) When the offender has the specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve years." § 14:30A.

An individual found guilty of first-degree murder is sentenced by the same jury in a separate proceeding to either death or life imprisonment without benefit of parole, probation, or suspension of sentence. § 14:30C. "A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed." La. Code Crim. Proc. Ann., Art. 905.3 (West 1984). Louisiana has established 10 statutory aggravating circum-

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gravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill or to inflict great bodily harm." La. Rev. Stat. Ann. § 14:30.1 (West 1986).

stances. Art. 905.4.[6] If the jury returns a sentence of death, the sentence is automatically reviewable for excessiveness by the Supreme Court of Louisiana. Art. 905.9.

Petitioner was found guilty of three counts of first-degree murder under § 14.30.A.(3): "[T]he offender has a specific intent to kill or to inflict great bodily harm upon more than one person." The sole aggravating circumstance both found by the jury and upheld by the Louisiana Supreme Court was that "the offender knowingly created a risk of death or great bodily harm to more than one person." Art. 905.4(d). In these circumstances, these two provisions are interpreted in

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[6] "The following shall be considered aggravating circumstances:

"(a) the offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or simple robbery;

"(b) the victim was a fireman or peace officer engaged in his lawful duties;

"(c) the offender was previously convicted of an unrelated murder, aggravated rape, or aggravated kidnapping or has a significant prior history of criminal activity;

"(d) the offender knowingly created a risk of death or great bodily harm to more than one person;

"(e) the offender offered or has been offered or has given or received anything of value for the commission of the offense;

"(f) the offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony;

"(g) the offense was committed in an especially heinous, atrocious, or cruel manner; or

"(h) the victim was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eyewitness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant.

"(i) the victim was a correctional officer or any other employee of the Louisiana Department of Corrections who, in the normal course of his employment was required to come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in his lawful duties at the time of the offense." La. Code Crim. Proc. Ann., Art. 905.4 (West 1984).

a "parallel fashion" under Louisiana law. See *State* v. *Williams*, 480 So. 2d 721, 726–727 (La. 1985). Petitioner's argument that the parallel nature of these provisions requires that his sentences be set aside rests on a mistaken premise as to the necessary role of aggravating circumstances.

To pass constitutional muster, a capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant* v. *Stephens*, 462 U. S. 862, 877 (1983); cf. *Gregg* v. *Georgia*, 428 U. S. 153 (1976). Under the capital sentencing laws of most States, the jury is required during the sentencing phase to find at least one aggravating circumstance before it may impose death. *Id.*, at 162–164 (reviewing Georgia sentencing scheme); *Proffitt* v. *Florida*, 428 U. S. 242, 247–250 (1976) (reviewing Florida sentencing scheme). By doing so, the jury narrows the class of persons eligible for the death penalty according to an objective legislative definition. *Zant*, *supra*, at 878 ("[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty").

In *Zant* v. *Stephens*, *supra*, we upheld a sentence of death imposed pursuant to the Georgia capital sentencing statute, under which "the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty." *Id.*, at 874. We found no constitutional deficiency in that scheme because the aggravating circumstances did all that the Constitution requires.

The use of "aggravating circumstances" is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be

performed by jury findings at either the sentencing phase of the trial or the guilt phase. Our opinion in *Jurek* v. *Texas*, 428 U. S. 262 (1976), establishes this point. The *Jurek* Court upheld the Texas death penalty statute, which, like the Louisiana statute, narrowly defined the categories of murders for which a death sentence could be imposed. If the jury found the defendant guilty of such a murder, it was required to impose death so long as it found beyond a reasonable doubt that the defendant's acts were deliberate, the defendant would probably constitute a continuing threat to society, and, if raised by the evidence, the defendant's acts were an unreasonable response to the victim's provocation. *Id.*, at 269. We concluded that the latter three elements allowed the jury to consider the mitigating aspects of the crime and the unique characteristics of the perpetrator, and therefore sufficiently provided for jury discretion. *Id.*, at 271–274. But the opinion announcing the judgment noted the difference between the Texas scheme, on the one hand, and the Georgia and Florida schemes discussed in the cases of *Gregg*, *supra*, and *Proffitt*, *supra:*

> "While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose. . . . In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravating circumstances. . . . Thus, in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed. So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option—even potentially—for

a smaller class of murders in Texas." 428 U. S., at 270–271 (citations omitted).

It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase. See also *Zant*, *supra*, at 876, n. 13, discussing *Jurek* and concluding: "[I]n Texas, aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution."

Here, the "narrowing function" was performed by the jury at the guilt phase when it found defendant guilty of three counts of murder under the provision that "the offender has a specific intent to kill or to inflict great bodily harm upon more than one person." The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm. There is no question but that the Louisiana scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more.

The judgment of the Court of Appeals for the Fifth Circuit is accordingly

Affirmed.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, and JUSTICE STEVENS joins as to Part I, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the

Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231–241 (1976) (MARSHALL, J., dissenting), I would vacate the decision below insofar as it left undisturbed the death sentence imposed in this case.

Even if I did not hold this view, I would vacate petitioner's sentence of death for two independent reasons. First, the jury that sentenced Leslie Lowenfield was subjected during the penalty phase of the trial to a combination of practices that courts have viewed as coercive in far less sensitive situations. The use of these practices in this case presents an unacceptable risk that the jury returned a sentence of death for reasons having nothing to do with proper constitutional considerations. Second, even in the absence of coercion, the jury's sentence of death could not stand because it was based on a single statutory aggravating circumstance that duplicated an element of petitioner's underlying offense. This duplication prevented Louisiana's sentencing scheme from adequately guiding the discretion of the sentencing jury in this case and relieved the jury of the requisite sense of responsibility for its sentencing decision. As we have recognized frequently in the past, such failings may have the effect of impermissibly biasing the sentencing process in favor of death in violation of the Eighth and the Fourteenth Amendments.

I

After many hours of deliberations, petitioner's sentencing jury informed the court that it was "having great distress" and unable to reach a verdict. App. 17. Had the jury remained deadlocked, petitioner would have received a sentence of life imprisonment by the operation of Louisiana law. But the presiding judge intervened to aid the jury in reaching a verdict, and petitioner now charges that the judge's intervention was coercive.

Two principles should guide our evaluation of petitioner's claim. First, recognizing that "impartiality" is a state difficult to define and "coercion" an event difficult to discern in concrete situations, we must be careful to focus on the par-

ticular facts of this case in order to assess "all the circumstances" surrounding the jury's progress from deadlock to unanimity. *Jenkins* v. *United States*, 380 U. S. 445, 446 (1965) *(per curiam)*. Second, we often have acknowledged that the unique nature of the death penalty demands a greater degree of reliability in capital sentencings than in other criminal proceedings. See, *e. g.*, *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (opinion of Burger, C. J., joined by Stewart, Powell, and STEVENS, JJ.); *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.).

The Court in this case pays mere lipservice to these concerns, citing the relevant portions of *Jenkins* and *Lockett* but then proceeding to ignore their teachings. The Court offers a sanitized rendition of the facts, ignoring or glossing over evidence of coercion in its examination of "all the circumstances" of the sentencing proceeding. The Court then performs a mechanical and cramped application of our precedents regarding jury coercion, essentially restricting these cases to their facts. Moreover, the Court focuses on the impact of each challenged practice in isolation, never addressing their cumulative effect. Finally, the Court neglects to consider how the capital sentencing context of this case affects the application of principles forged in other contexts. In sum, the Court's approach fails to take seriously petitioner's challenge and consequently fails to recognize its force. The Court's decision to condone the coercive practices at issue here renders hollow our pronouncement that "the decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death." *Witherspoon* v. *Illinois*, 391 U. S. 510, 521–522, n. 20 (1968).

The starting point for any determination of jury coercion is the facts of a given case. The opinion of the Court, however, does not keep its promise to examine "all the circumstances," failing to mention several significant events in evaluating whether the trial court's conduct improperly influenced the

jury's decision. First, the Court treats as irrelevant all events preceding the polling of the jury and the administration of the *Allen* charge. *Allen* v. *United States*, 164 U. S. 492 (1896). The Court fails to recognize that the guilt phase of petitioner's trial, which immediately preceded the sentencing phase, shaped the jury's collective state of mind and relationship to the court. The jury's deliberations on the issue of guilt or innocence lasted 13 hours over 2 days. After 11 hours of deliberation, the jury informed the court that it was experiencing "much distress" and requested to view some physical evidence. App. 16. The court refused the request and stated: "*I order you* to go back to the jury room and to deliberate and *arrive at a verdict.*" *Id.*, at 24 (emphasis added). Defense counsel objected to this instruction and raised that objection again during the penalty phase on the ground that it might have a "residual effect" on the sentencing process. *Id.*, at 51. After the jury returned its guilt phase verdict at 3 p.m., the court gave the jury only an hour's break before conducting the sentencing hearing and sending the jury to deliberate at 8:17 p.m. These events might well have suggested to the jury that the court was anxious for a verdict to be reached and reached quickly. That impression might have received further support when, at 11:55 p.m. and after a total of more than 13 hours that day in court, the jury requested permission to retire for the night, and the court inquired: "Is there any way you could continue deliberating tonight and arrive at a verdict?" *Id.*, at 48. This background, which the Court ignores, is important to an understanding and evaluation of the jury's reaction to the polling procedures and the modified *Allen* charge of the following day.

Second, although the Court notes that the jury was instructed at the commencement of the sentencing phase that its failure to reach a verdict would result in a life sentence rather than a second sentencing hearing, the Court fails to observe that this instruction was repeated three more times

during the proceeding. First, the jury sent a note specifically asking whether a life sentence would result automatically from a failure to reach a verdict, to which the court responded affirmatively. Second, the court repeated this instruction before polling the jury as to whether further deliberations would be helpful. Finally, the court repeated it again immediately after twice polling the jury and immediately before giving the modified *Allen* charge. The court's reiteration of the consequences of failing to reach a verdict before the jury poll and again before the verdict-urging charge may well have been understood by the jury as an expression by the court of reluctance to impose only a life sentence and an admonition to reach a verdict.

Third, the Court does not mention the refusal of defense counsel's specific request that the jury be instructed that it was not required by law to return a verdict. In *Hyde* v. *United States*, 225 U. S. 347 (1912), we rejected a claim of jury coercion by relying on the court's statement to the jurors that if "'they could not conscientiously and freely agree upon a verdict they would be discharged.'" *Id.*, at 382. We concluded that "[i]t is hard to believe that . . . with that promise expressly made to them, they were coerced by a threat of confinement to acquit those who they were convinced were guilty or convict those who they were convinced were innocent." *Id.*, at 383. In the decided absence of such an instruction, the possibility of coercion runs much stronger.

None of the above circumstances is by itself a reason to conclude that the jury was coerced in this case. But these circumstances, as well as those recounted by the Court, make up the "totality" in light of which we must judge the practices challenged in this case. Both the polling procedures and the *Allen* charge administered by the court must be examined against this background, first individually and then as a cumulative whole.

The Court makes quick work of petitioner's challenge to the court's polling of the jury in this case. Observing that

the court's inquiries regarding the helpfulness of further deliberations were "clearly independent" of an inquiry regarding the jury's stance on the merits, the Court concludes that the pollings of the jury did not "'reveal the nature or extent of its division.'" *Ante*, at 240 (quoting *Brasfield* v. *United States*, 272 U. S. 448, 450 (1926)). Such a conclusion might be accurate in an ordinary trial setting, where a hung jury leads only to retrial. But the Court ignores the fact that the jury in this case had been instructed repeatedly that failure to reach a verdict would automatically result in a life sentence. With this background knowledge, a juror's vote against further deliberations indicated acceptance of the life sentence that would necessarily follow. The jury's response to the polling questions in this case thus very probably revealed the nature and extent of its substantive division.

Not only does the Court refuse to acknowledge that the polling in this case is similar in nature to the polling we condemned in *Brasfield*, it also ignores the ways in which this case is worse than *Brasfield*. The court here polled the jury not once, but twice, increasing whatever coercive effect a single poll would have had. Moreover, the second poll whittled down the minority jurors from 4 to 1, creating enormous pressure on the lone holdout, as compared to the minority of three jurors in *Brasfield*. Finally, the jurors in this case were asked to identify themselves by name in both polls, exposing the identities of the minority jurors to the court. Under such circumstances, the polling procedures used here posed an even greater risk of "improper influence upon the jury" than the poll we examined and rejected in *Brasfield*. *Id.*, at 450.

The Court's treatment of petitioner's challenge to the *Allen* charge is similarly dismissive. The Court begins by suggesting that the validity of such charges is "beyond dispute," citing cases from all of the Circuits in which some form of an *Allen* charge has been upheld. *Ante*, at 237–238, and n. 1. This sweeping statement denigrates the serious res-

ervations expressed by many federal[1] and state[2] courts concerning the coercive nature of the traditional *Allen* charge. These reservations, voiced in the context of ordinary criminal trials, have particular significance for the instant case. The usual justifications for a verdict-urging charge are the time, expense, and possible loss of evidence that a new trial would entail. None of these justifications was present here, where a hung jury would have resulted in a life sentence. Moreover, in an ordinary criminal trial, an *Allen* charge will not steer the jury one way or the other on the merits, because it is as likely that the minority jurors are for conviction as for acquittal. Here, the charge inevitably made a verdict of death more likely, because a continued deadlock would have achieved a substantive outcome of a life sentence rather than simply another sentencing hearing. These considerations indicate that the State's interest in a verdict in this case was relatively weak, whereas the defendant's interest in preserving the integrity of a dissenting vote was correspondingly strong. The general reservations voiced by other courts

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[1] See, *e. g.*, *United States* v. *Rey*, 811 F. 2d 1453, 1458, 1460 (CA11) ("The modern judicial trend . . . is against the Allen charge. . . . As we see it, the Allen charge interferes with the jurors when they are performing their most important role: determining guilt or innocence in a close case. It unjustifiably increases the risk that an *innocent* person will be convicted as a result of the juror abandoning his honestly-held beliefs"), cert. denied, 484 U. S. 830 (1987); *United States* v. *Blandin*, 784 F. 2d 1048, 1050 (CA10 1986) ("We have approved the *Allen* instruction as permissible in the Tenth Circuit, but urge caution in its use. . . . It should not be given during the course of deliberations"); *United States* v. *Seawell*, 550 F. 2d 1159, 1162, 1163 (CA9 1977) ("Problems arising from the inherently coercive effect of the *Allen* charge have caused other courts of appeals and state courts to prohibit or to restrict severely its use. . . . A single *Allen* charge, without more, stands at the brink of impermissible coercion") (footnotes omitted).

[2] See, *e. g.*, *People* v. *Gainer*, 19 Cal. 3d 835, 566 P. 2d 997 (1977) (banning use of traditional *Allen* charge in all criminal cases); *State* v. *Czachor*, 82 N. J. 392, 413 A. 2d 593 (1980) (same); *Kersey* v. *State*, 525 S. W. 2d 139 (Tenn. 1975) (same).

about the coerciveness of verdict-urging charges should be given special attention under these circumstances.

The opinion of the Court, however, persistently refuses to recognize the unique posture of this case. Instead, it blandly notes that this case is factually distinguishable from our other significant jury coercion cases, *Jenkins* v. *United States*, 380 U. S. 445 (1965), and *United States* v. *United States Gypsum Co.*, 438 U. S. 422 (1978). This analysis, if such it may be called, fails to recognize the animating principle of both *Jenkins* and *Gypsum:* If the jury might believe from the trial court's statements or actions that the court is insisting upon a verdict "'one way or the other,'" 438 U. S., at 460, that message poses an impermissible risk of jury coercion. Just such a risk was posed here, when the court gave a verdict-urging charge to a jury that knew, and indeed had just been instructed, that its failure to reach unanimity would result in the substantive outcome of a life sentence.

The Court's most significant analytical failure, however, lies in its refusal to consider petitioner's charge of coercion in other than a piecemeal fashion. Content that the polling procedures did not contravene *Brasfield* and that the verdict-urging charge satisfied *Allen*, the Court never considers the two practices in tandem. Other federal courts have recognized that an *Allen* charge given on the heels of a jury poll poses special risks of coercion. See *United States* v. *Sae-Chua*, 725 F. 2d 530, 532 (CA9 1984); *Cornell* v. *Iowa*, 628 F. 2d 1044, 1048, n. 2 (CA8 1980), cert. denied, 449 U. S. 1126 (1981); *Williams* v. *United States*, 119 U. S. App. D. C. 190, 193, 338 F. 2d 530, 533 (1964). These courts have noted that when a jury poll is followed by an *Allen* charge, "the impression is inherently conveyed to the jury that the revelation of their division prompted the giving of the subsequent verdict-urging instruction and that it is, therefore, directed toward the minority jurors." *Cornell* v. *Iowa*, *supra*, at 1048, n. 2. In this case, the charge was given after the polling had pared down the minority to a single juror, identified

to the court by name. That juror could not help feeling that the verdict-urging charge was directed at him and him alone. The polling and the charge in this case together created an atmosphere far more charged with coercion than either practice alone possibly could have engendered. Such coercion is strongly evidenced by the fact that the jury returned a verdict of death a mere 30 minutes after the court gave the verdict-urging charge.[3]

It is an open and a far closer question whether the practices challenged in this case should be deemed coercive in an ordinary criminal context. We have recognized often and reiterated last Term that practices entirely appropriate in other contexts may be improper in capital sentencing proceedings. See *Booth* v. *Maryland*, 482 U. S. 496, 509, n. 12 (1987). The Court in this case, however, fails to recognize this principle and makes no attempt to assess how the capital sentencing context affects the legitimacy of the challenged practices. This failure is troubling not only because we require greater reliability in capital sentencings, but also because the nature of the capital sentencing process makes the practices challenged here more dangerous. The capital sentencing jury is asked to make a moral decision about whether a particular individual should live or die. Despite the objective factors that are introduced in an attempt to guide the exercise of the jurors' discretion, theirs is largely a sub-

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[3]The Court argues that the failure of petitioner's counsel to object to the polling or the *Allen* charge suggests that their coercive potential was not "apparent." *Ante*, at 240. The Court fails to acknowledge, however, that at the time of the polling and charge, defense counsel had already moved three separate times for a mistrial during the sentencing phase: once when the jury had been out for more than five hours, again when the jury sent a note indicating its deadlock, and again after the first polling revealed an 8-to-4 division as to whether further deliberations would be helpful. Defense counsel may well have reasoned that renewing his motions during the second polling or the *Allen* charge would be unavailing. In any case, counsel's repeated mistrial motions clearly demonstrate his awareness of the jury's confusion and distress.

jective judgment. Given the amorphous and volatile nature of their inquiry, capital sentencing juries that have reached an impasse in their deliberations may be particularly prone to coercion from the court. This concern leads me to conclude that the jury polling and *Allen* charge used in this case created an unacceptable risk of jury coercion and thus were "inconsistent with the reasoned decisionmaking we require in capital cases." *Booth* v. *Maryland*, *supra*, at 509 (footnote omitted).

II

Even had the jury reached its verdict free from any improper influence by the court, that verdict still could not stand. The principles established by our prior cases preclude the imposition of the death penalty when it is based on a single statutory aggravating circumstance that merely duplicates an element of the underlying offense. We have insisted repeatedly that the discretion of the sentencer be guided by a narrowing of the class of people eligible for the death penalty and that the sentencer be fully cognizant of its responsibility for the imposition of a sentence of life or death. Both of these principles have been violated by the operation of the Louisiana sentencing scheme in this case.

Since our decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972), we have required that there be a "meaningful basis for distinguishing the few cases in which [the death sentence] is imposed from the many cases in which it is not." *Id.*, at 313 (WHITE, J., concurring). We have held consistently that statutory aggravating circumstances considered during the sentencing process provide one of the means by which the jury's discretion is guided in making such constitutionally mandated distinctions. See, *e. g.*, *McCleskey* v. *Kemp*, 481 U. S. 279, 305 (1987) (describing "the role of the aggravating circumstance in guiding the sentencing jury's discretion"); *Zant* v. *Stephens*, 462 U. S. 862, 877 (1983) (holding that "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty"); *Gregg*

v. *Georgia*, 428 U. S., at 197 (opinion of Stewart, Powell, and STEVENS, JJ.) (explaining that the finding of statutory aggravating circumstances helps the jury "to consider the circumstances of the crime and the criminal before it recommends sentence").

The Court today suggests that our emphasis on aggravating circumstances has been mere happenstance and holds that the critical narrowing function may be performed prior to and distinct from the sentencing process.[4] This holding misunderstands the significance of the narrowing requirement. The Court treats the narrowing function as a merely technical requirement that the number of those eligible for

[4] The Court argues that our opinion in *Jurek* v. *Texas*, 428 U. S. 262 (1976), establishes that the narrowing requirement may constitutionally be met at the guilt phase rather than the sentencing phase. It focuses on dicta in the opinion announcing the judgment to the effect that the classes of capital murder established by the Texas Legislature serve "'much the same purpose'" as a list of statutory aggravating circumstances. *Ante*, at 245 (quoting *Jurek* v. *Texas*, *supra*, at 270 (opinion of Stewart, Powell, and STEVENS, JJ.)). The Court ignores our later recognition that the three questions posed to the jury during the sentencing phase under the scheme approved in *Jurek* establish additional aggravating circumstances not already determined during the guilt phase. See, *e. g.*, *Skipper* v. *South Carolina*, 476 U. S. 1, 5 (1986) ("[E]vidence that a defendant would in the future pose a danger to the community if he were not executed may be treated as establishing an 'aggravating factor' for purposes of capital sentencing"); *Adams* v. *Texas*, 448 U. S. 38, 46 (1980) (In answering the three sentencing questions affirmatively, jurors in Texas "must consider both aggravating and mitigating circumstances, whether appearing in the evidence presented at the trial on guilt or innocence or during the sentencing proceedings"). Hence, *Jurek* cannot establish our approval of a divorce of the narrowing requirement from the sentencing proceedings.

Moreover, even if *Jurek* did stand for the proposition advanced by the Court, it would still be distinguishable from the instant case. Under the Texas capital sentencing statute evaluated in *Jurek*, jurors are explicitly instructed at the guilt phase that their findings would make the defendant eligible for the death penalty. See *Jurek* v. *State*, 522 S. W. 2d 934, 938 (Tex. Crim. App. 1975). In the instant case, the jurors were specifically instructed *not* to consider the penalty that might result from their findings during the guilt phase. See Record 2283.

the death penalty be made smaller than the number of those convicted of murder. But narrowing the class of death eligible offenders is not "an end in itself" any more than aggravating circumstances are. See *ante*, at 244. Rather, as our cases have emphasized consistently, the narrowing requirement is meant to channel the discretion of the sentencer. It forces the capital sentencing jury to approach its task in a structured, step-by-step way, first determining whether a defendant is eligible for the death penalty and then determining whether all of the circumstances justify its imposition. The only conceivable reason for making narrowing a constitutional requirement is its function in structuring sentencing deliberations. By permitting the removal of the narrowing function from the sentencing process altogether, the Court reduces it to a mechanical formality entirely unrelated to the choice between life and death.

The Court's relegation of the narrowing function to the guilt phase of a capital trial implicates the concerns we expressed in another context in *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985). In *Caldwell*, we vacated petitioner's sentence of death when the prosecutor had argued to the jury that the appellate court would review the imposition of the death sentence for correctness, concluding that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsiblity for determining the appropriateness of the defendant's death rests elsewhere." *Id.*, at 328–329. Here, the sentencing jurors were led to believe that petitioner's eligibility for the death sentence was already established by their findings during the guilt phase—findings arrived at without any contemplation of their implication for petitioner's sentence. Indeed, the court specifically instructed the jury at the start of its guilt phase deliberations: "You are not to discuss, in any way, the possibility of any penalties whatsoever." Record 2283. Then, during the penalty hearing, the prosecutor twice reminded the jury that

it had already found during the guilt phase one of the aggravating circumstances that the State urged was applicable to petitioner's sentence. *Id.*, at 2311, 2319. The prosecutor's argument might well have convinced the jury that it had no choice about and hence no responsibility for the defendant's eligibilty for the death penalty. This situation cannot be squared with our promise to ensure that "a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.'" *Caldwell* v. *Mississippi*, *supra*, at 341.

In sum, the application of the Louisiana sentencing scheme in cases like this one, where there is a complete overlap between aggravating circumstances found at the sentencing phase and elements of the offense previously found at the guilt phase, violates constitutional principles in ways that will inevitably tilt the sentencing scales toward the imposition of the death penalty. The State will have an easier time convincing a jury beyond a reasonable doubt to find a necessary element of a capital offense at the guilt phase of a trial if the jury is unaware that such a finding will make the defendant eligible for the death penalty at the sentencing phase. Then the State will have an even easier time arguing for the imposition of the death penalty, because it can remind the jury at the sentencing phase, as it did in this case, that the necessary aggravating circumstances already have been established beyond a reasonable doubt. The State thus enters the sentencing hearing with the jury already across the threshold of death eligibility, without any awareness on the jury's part that it had crossed that line. By permitting such proceedings in a capital case, the Court ignores our early pronouncement that "a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death." *Witherspoon* v. *Illinois*, 391 U. S., at 521 (footnote omitted).

III

After a total of 22 hours of almost continuous deliberations regarding petitioner's guilt and appropriate sentence, the jury in this case informed the court that it was in "great distress." Had the jury not broken its deadlock, petitioner would have been entitled to a life sentence without retrial. Thus, at 3 p.m. on May 16, 1984, Leslie Lowenfield's life hung delicately in the balance. It is impossible to know what finally prompted the jury to return its sentence of death, but the coercive practices engaged in by the trial court, or the prosecutor's argument that a key aggravating circumstance already had been established at the guilt phase, may well have tipped the balance. Neither of these factors has any place in capital sentencing deliberations, and their presence in this case convinces me that petitioner was denied the individualized and reasoned consideration of his penalty that the Constitution promises him. I dissent.

HAZELWOOD SCHOOL DISTRICT ET AL. *v.* KUHLMEIER ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 86-836. Argued October 13, 1987—Decided January 13, 1988

Respondents, former high school students who were staff members of the school's newspaper, filed suit in Federal District Court against petitioners, the school district and school officials, alleging that respondents' First Amendment rights were violated by the deletion from a certain issue of the paper of two pages that included an article describing school students' experiences with pregnancy and another article discussing the impact of divorce on students at the school. The newspaper was written and edited by a journalism class, as part of the school's curriculum. Pursuant to the school's practice, the teacher in charge of the paper submitted page proofs to the school's principal, who objected to the pregnancy story because the pregnant students, although not named, might be identified from the text, and because he believed that the article's references to sexual activity and birth control were inappropriate for some of the younger students. The principal objected to the divorce article because the page proofs he was furnished identified by name (deleted by the teacher from the final version) a student who complained of her father's conduct, and the principal believed that the student's parents should have been given an opportunity to respond to the remarks or to consent to their publication. Believing that there was no time to make necessary changes in the articles if the paper was to be issued before the end of the school year, the principal directed that the pages on which they appeared be withheld from publication even though other, unobjectionable articles were included on such pages. The District Court held that no First Amendment violation had occurred. The Court of Appeals reversed.

Held: Respondents' First Amendment rights were not violated. Pp. 266-276.

(a) First Amendment rights of students in the public schools are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment. A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school. Pp. 266-267.

(b) The school newspaper here cannot be characterized as a forum for public expression. School facilities may be deemed to be public forums

only if school authorities have by policy or by practice opened the facilities for indiscriminate use by the general public, or by some segment of the public, such as student organizations. If the facilities have instead been reserved for other intended purposes, communicative or otherwise, then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community. The school officials in this case did not deviate from their policy that the newspaper's production was to be part of the educational curriculum and a regular classroom activity under the journalism teacher's control as to almost every aspect of publication. The officials did not evince any intent to open the paper's pages to indiscriminate use by its student reporters and editors, or by the student body generally. Accordingly, school officials were entitled to regulate the paper's contents in any reasonable manner. Pp. 267–270.

(c) The standard for determining when a school may punish student expression that happens to occur on school premises is not the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, distinguished. Educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns. Pp. 270–273.

(d) The school principal acted reasonably in this case in requiring the deletion of the pregnancy article, the divorce article, and the other articles that were to appear on the same pages of the newspaper. Pp. 274–276.

795 F. 2d 1368, reversed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, and SCALIA, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 277.

Robert P. Baine, Jr., argued the cause for petitioners. With him on the briefs were *John Gianoulakis* and *Robert T. Haar*.

Leslie D. Edwards argued the cause and filed a brief for respondents.*

**Ronald A. Zumbrun* and *Anthony T. Caso* filed a brief for the Pacific Legal Foundation as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Janet L. Benshoof, John A. Powell, Steven*

JUSTICE WHITE delivered the opinion of the Court.

This case concerns the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum.

I

Petitioners are the Hazelwood School District in St. Louis County, Missouri; various school officials; Robert Eugene Reynolds, the principal of Hazelwood East High School; and Howard Emerson, a teacher in the school district. Respondents are three former Hazelwood East students who were staff members of Spectrum, the school newspaper. They contend that school officials violated their First Amendment rights by deleting two pages of articles from the May 13, 1983, issue of Spectrum.

Spectrum was written and edited by the Journalism II class at Hazelwood East. The newspaper was published every three weeks or so during the 1982–1983 school year. More than 4,500 copies of the newspaper were distributed during that year to students, school personnel, and members of the community.

The Board of Education allocated funds from its annual budget for the printing of Spectrum. These funds were supplemented by proceeds from sales of the newspaper. The printing expenses during the 1982–1983 school year totaled $4,668.50; revenue from sales was $1,166.84. The other costs associated with the newspaper—such as supplies, text-

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R. Shapiro, and *Frank Susman;* for the American Society of Newspaper Editors et al. by *Richard M. Schmidt, Jr.;* for People for the American Way by *Marvin E. Frankel;* for the NOW Legal Defense and Education Fund et al. by *Martha L. Minow*, *Sarah E. Burns*, and *Marsha Levick;* for the Planned Parenthood Federation of America, Inc., et al. by *Eve W. Paul;* and for the Student Press Law Center et al. by *J. Marc Abrams.*

Briefs of *amici curiae* were filed for the National School Boards Association et al. by *Gwendolyn H. Gregory*, *August W. Steinhilber*, *Thomas A. Shannon*, and *Ivan B. Gluckman;* and for the School Board of Dade County, Florida, by *Frank A. Howard, Jr.*, and *Johnny Brown.*

books, and a portion of the journalism teacher's salary—were borne entirely by the Board.

The Journalism II course was taught by Robert Stergos for most of the 1982–1983 academic year. Stergos left Hazelwood East to take a job in private industry on April 29, 1983, when the May 13 edition of Spectrum was nearing completion, and petitioner Emerson took his place as newspaper adviser for the remaining weeks of the term.

The practice at Hazelwood East during the spring 1983 semester was for the journalism teacher to submit page proofs of each Spectrum issue to Principal Reynolds for his review prior to publication. On May 10, Emerson delivered the proofs of the May 13 edition to Reynolds, who objected to two of the articles scheduled to appear in that edition. One of the stories described three Hazelwood East students' experiences with pregnancy; the other discussed the impact of divorce on students at the school.

Reynolds was concerned that, although the pregnancy story used false names "to keep the identity of these girls a secret," the pregnant students still might be identifiable from the text. He also believed that the article's references to sexual activity and birth control were inappropriate for some of the younger students at the school. In addition, Reynolds was concerned that a student identified by name in the divorce story had complained that her father "wasn't spending enough time with my mom, my sister and I" prior to the divorce, "was always out of town on business or out late playing cards with the guys," and "always argued about everything" with her mother. App. to Pet. for Cert. 38. Reynolds believed that the student's parents should have been given an opportunity to respond to these remarks or to consent to their publication. He was unaware that Emerson had deleted the student's name from the final version of the article.

Reynolds believed that there was no time to make the necessary changes in the stories before the scheduled press run

and that the newspaper would not appear before the end of the school year if printing were delayed to any significant extent. He concluded that his only options under the circumstances were to publish a four-page newspaper instead of the planned six-page newspaper, eliminating the two pages on which the offending stories appeared, or to publish no newspaper at all. Accordingly, he directed Emerson to withhold from publication the two pages containing the stories on pregnancy and divorce.[1] He informed his superiors of the decision, and they concurred.

Respondents subsequently commenced this action in the United States District Court for the Eastern District of Missouri seeking a declaration that their First Amendment rights had been violated, injunctive relief, and monetary damages. After a bench trial, the District Court denied an injunction, holding that no First Amendment violation had occurred. 607 F. Supp. 1450 (1985).

The District Court concluded that school officials may impose restraints on students' speech in activities that are "'an integral part of the school's educational function'"—including the publication of a school-sponsored newspaper by a journalism class—so long as their decision has "'a substantial and reasonable basis.'" *Id.*, at 1466 (quoting *Frasca* v. *Andrews*, 463 F. Supp. 1043, 1052 (EDNY 1979)). The court found that Principal Reynolds' concern that the pregnant students' anonymity would be lost and their privacy invaded was "legitimate and reasonable," given "the small number of pregnant students at Hazelwood East and several identifying characteristics that were disclosed in the article." 607 F. Supp., at 1466. The court held that Reynolds' action was also justified "to avoid the impression that [the school] en-

[1] The two pages deleted from the newspaper also contained articles on teenage marriage, runaways, and juvenile delinquents, as well as a general article on teenage pregnancy. Reynolds testified that he had no objection to these articles and that they were deleted only because they appeared on the same pages as the two objectionable articles.

dorses the sexual norms of the subjects" and to shield younger students from exposure to unsuitable material. *Ibid.* The deletion of the article on divorce was seen by the court as a reasonable response to the invasion of privacy concerns raised by the named student's remarks. Because the article did not indicate that the student's parents had been offered an opportunity to respond to her allegations, said the court, there was cause for "serious doubt that the article complied with the rules of fairness which are standard in the field of journalism and which were covered in the textbook used in the Journalism II class." *Id.*, at 1467. Furthermore, the court concluded that Reynolds was justified in deleting two full pages of the newspaper, instead of deleting only the pregnancy and divorce stories or requiring that those stories be modified to address his concerns, based on his "reasonable belief that he had to make an immediate decision and that there was no time to make modifications to the articles in question." *Id.*, at 1466.

The Court of Appeals for the Eighth Circuit reversed. 795 F. 2d 1368 (1986). The court held at the outset that Spectrum was not only "a part of the school adopted curriculum," *id.*, at 1373, but also a public forum, because the newspaper was "intended to be and operated as a conduit for student viewpoint." *Id.*, at 1372. The court then concluded that Spectrum's status as a public forum precluded school officials from censoring its contents except when "'necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others.'" *Id.*, at 1374 (quoting *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 511 (1969)).

The Court of Appeals found "no evidence in the record that the principal could have reasonably forecast that the censored articles or any materials in the censored articles would have materially disrupted classwork or given rise to substantial disorder in the school." 795 F. 2d, at 1375. School officials were entitled to censor the articles on the ground that

they invaded the rights of others, according to the court, only if publication of the articles could have resulted in tort liability to the school. The court concluded that no tort action for libel or invasion of privacy could have been maintained against the school by the subjects of the two articles or by their families. Accordingly, the court held that school officials had violated respondents' First Amendment rights by deleting the two pages of the newspaper.

We granted certiorari, 479 U. S. 1053 (1987), and we now reverse.

II

Students in the public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, *supra*, at 506. They cannot be punished merely for expressing their personal views on the school premises—whether "in the cafeteria, or on the playing field, or on the campus during the authorized hours," 393 U. S., at 512–513—unless school authorities have reason to believe that such expression will "substantially interfere with the work of the school or impinge upon the rights of other students." *Id.*, at 509.

We have nonetheless recognized that the First Amendment rights of students in the public schools "are not automatically coextensive with the rights of adults in other settings," *Bethel School District No. 403* v. *Fraser*, 478 U. S. 675, 682 (1986), and must be "applied in light of the special characteristics of the school environment." *Tinker*, *supra*, at 506; cf. *New Jersey* v. *T. L. O.*, 469 U. S. 325, 341–343 (1985). A school need not tolerate student speech that is inconsistent with its "basic educational mission," *Fraser*, *supra*, at 685, even though the government could not censor similar speech outside the school. Accordingly, we held in *Fraser* that a student could be disciplined for having delivered a speech that was "sexually explicit" but not legally obscene at an official school assembly, because the school was entitled to "disassociate itself" from the speech in a man-

ner that would demonstrate to others that such vulgarity is "wholly inconsistent with the 'fundamental values' of public school education." 478 U. S., at 685–686. We thus recognized that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board," *id.*, at 683, rather than with the federal courts. It is in this context that respondents' First Amendment claims must be considered.

A

We deal first with the question whether Spectrum may appropriately be characterized as a forum for public expression. The public schools do not possess all of the attributes of streets, parks, and other traditional public forums that "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague* v. *CIO*, 307 U. S. 496, 515 (1939). Cf. *Widmar* v. *Vincent*, 454 U. S. 263, 267–268, n. 5 (1981). Hence, school facilities may be deemed to be public forums only if school authorities have "by policy or by practice" opened those facilities "for indiscriminate use by the general public," *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 47 (1983), or by some segment of the public, such as student organizations. *Id.*, at 46, n. 7 (citing *Widmar* v. *Vincent*). If the facilities have instead been reserved for other intended purposes, "communicative or otherwise," then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community. 460 U. S., at 46, n. 7. "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc.*, 473 U. S. 788, 802 (1985).

The policy of school officials toward Spectrum was reflected in Hazelwood School Board Policy 348.51 and the Hazelwood East Curriculum Guide. Board Policy 348.51 provided that "[s]chool sponsored publications are developed within the adopted curriculum and its educational implications in regular classroom activities." App. 22. The Hazelwood East Curriculum Guide described the Journalism II course as a "laboratory situation in which the students publish the school newspaper applying skills they have learned in Journalism I." *Id.*, at 11. The lessons that were to be learned from the Journalism II course, according to the Curriculum Guide, included development of journalistic skills under deadline pressure, "the legal, moral, and ethical restrictions imposed upon journalists within the school community," and "responsibility and acceptance of criticism for articles of opinion." *Ibid.* Journalism II was taught by a faculty member during regular class hours. Students received grades and academic credit for their performance in the course.

School officials did not deviate in practice from their policy that production of Spectrum was to be part of the educational curriculum and a "regular classroom activit[y]." The District Court found that Robert Stergos, the journalism teacher during most of the 1982–1983 school year, "both had the authority to exercise and in fact exercised a great deal of control over *Spectrum*." 607 F. Supp., at 1453. For example, Stergos selected the editors of the newspaper, scheduled publication dates, decided the number of pages for each issue, assigned story ideas to class members, advised students on the development of their stories, reviewed the use of quotations, edited stories, selected and edited the letters to the editor, and dealt with the printing company. Many of these decisions were made without consultation with the Journalism II students. The District Court thus found it "clear that Mr. Stergos was the final authority with respect to almost every aspect of the production and publication of *Spectrum*, including its content." *Ibid.* Moreover, after

each Spectrum issue had been finally approved by Stergos or his successor, the issue still had to be reviewed by Principal Reynolds prior to publication. Respondents' assertion that they had believed that they could publish "practically anything" in Spectrum was therefore dismissed by the District Court as simply "not credible." *Id.*, at 1456. These factual findings are amply supported by the record, and were not rejected as clearly erroneous by the Court of Appeals.

The evidence relied upon by the Court of Appeals in finding Spectrum to be a public forum, see 795 F. 2d, at 1372–1373, is equivocal at best. For example, Board Policy 348.51, which stated in part that "[s]chool sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism," also stated that such publications were "developed within the adopted curriculum and its educational implications." App. 22. One might reasonably infer from the full text of Policy 348.51 that school officials retained ultimate control over what constituted "responsible journalism" in a school-sponsored newspaper. Although the Statement of Policy published in the September 14, 1982, issue of Spectrum declared that "*Spectrum*, as a student-press publication, accepts all rights implied by the First Amendment," this statement, understood in the context of the paper's role in the school's curriculum, suggests at most that the administration will not interfere with the students' exercise of those First Amendment rights that attend the publication of a school-sponsored newspaper. It does not reflect an intent to expand those rights by converting a curricular newspaper into a public forum.[2] Fi-

[2] The Statement also cited *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503 (1969), for the proposition that "[o]nly speech that 'materially and substantially interferes with the requirements of appropriate discipline' can be found unacceptable and therefore be prohibited." App. 26. This portion of the Statement does not, of course, even accurately reflect our holding in *Tinker*. Furthermore, the Statement nowhere expressly extended the *Tinker* standard to the news and feature articles contained in a school-sponsored newspaper. The dissent

nally, that students were permitted to exercise some authority over the contents of Spectrum was fully consistent with the Curriculum Guide objective of teaching the Journalism II students "leadership responsibilities as issue and page editors." App. 11. A decision to teach leadership skills in the context of a classroom activity hardly implies a decision to relinquish school control over that activity. In sum, the evidence relied upon by the Court of Appeals fails to demonstrate the "clear intent to create a public forum," *Cornelius*, 473 U. S., at 802, that existed in cases in which we found public forums to have been created. See *id.*, at 802–803 (citing *Widmar* v. *Vincent*, 454 U. S., at 267; *Madison School District* v. *Wisconsin Employment Relations Comm'n*, 429 U. S. 167, 174, n. 6 (1976); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 555 (1975)). School officials did not evince either "by policy or by practice," *Perry Education Assn.*, 460 U. S., at 47, any intent to open the pages of Spectrum to "indiscriminate use," *ibid.*, by its student reporters and editors, or by the student body generally. Instead, they "reserve[d] the forum for its intended purpos[e]," *id.*, at 46, as a supervised learning experience for journalism students. Accordingly, school officials were entitled to regulate the contents of Spectrum in any reasonable manner. *Ibid.* It is this standard, rather than our decision in *Tinker*, that governs this case.

B

The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirma-

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apparently finds as a fact that the Statement was published annually in Spectrum; however, the District Court was unable to conclude that the Statement appeared on more than one occasion. In any event, even if the Statement says what the dissent believes that it says, the evidence that school officials never intended to designate Spectrum as a public forum remains overwhelming.

tively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.[3]

Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. Hence, a school may in its capacity as publisher of a school newspaper or producer of a school play "disassociate itself," *Fraser*, 478 U. S., at 685, not only from speech that would "substantially interfere with [its] work . . . or impinge upon the rights of other students," *Tinker*, 393 U. S., at 509, but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.[4] A school must be able to set high standards for

[3] The distinction that we draw between speech that is sponsored by the school and speech that is not is fully consistent with *Papish* v. *University of Missouri Board of Curators*, 410 U. S. 667 (1973) *(per curiam)*, which involved an off-campus "underground" newspaper that school officials merely had allowed to be sold on a state university campus.

[4] The dissent perceives no difference between the First Amendment analysis applied in *Tinker* and that applied in *Fraser*. We disagree. The decision in *Fraser* rested on the "vulgar," "lewd," and "plainly offensive" character of a speech delivered at an official school assembly rather than on

the student speech that is disseminated under its auspices—standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the "real" world—and may refuse to disseminate student speech that does not meet those standards. In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting. A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with "the shared values of a civilized social order," *Fraser*, *supra*, at 683, or to associate the school with any position other than neutrality on matters of political controversy. Otherwise, the schools would be unduly constrained from fulfilling their role as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954).

Accordingly, we conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dis-

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any propensity of the speech to "materially disrup[t] classwork or involv[e] substantial disorder or invasion of the rights of others." 393 U. S., at 513. Indeed, the *Fraser* Court cited as "especially relevant" a portion of Justice Black's dissenting opinion in *Tinker* "'disclaim[ing] any purpose . . . to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students.'" 478 U. S., at 686 (quoting 393 U. S., at 526). Of course, Justice Black's observations are equally relevant to the instant case.

semination of student expression.[5] Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.[6]

This standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges. See, *e. g.*, *Board of Education of Hendrick Hudson Central School Dist.* v. *Rowley*, 458 U. S. 176, 208 (1982); *Wood* v. *Strickland*, 420 U. S. 308, 326 (1975); *Epperson* v. *Arkansas*, 393 U. S. 97, 104 (1968). It is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so "directly and sharply implicate[d]," *ibid.*, as to require judicial intervention to protect students' constitutional rights.[7]

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[5] We therefore need not decide whether the Court of Appeals correctly construed *Tinker* as precluding school officials from censoring student speech to avoid "invasion of the rights of others," 393 U. S., at 513, except where that speech could result in tort liability to the school.

[6] We reject respondents' suggestion that school officials be permitted to exercise prepublication control over school-sponsored publications only pursuant to specific written regulations. To require such regulations in the context of a curricular activity could unduly constrain the ability of educators to educate. We need not now decide whether such regulations are required before school officials may censor publications not sponsored by the school that students seek to distribute on school grounds. See *Baughman* v. *Freienmuth*, 478 F. 2d 1345 (CA4 1973); *Shanley* v. *Northeast Independent School Dist., Bexar Cty., Tex.*, 462 F. 2d 960 (CA5 1972); *Eisner* v. *Stamford Board of Education*, 440 F. 2d 803 (CA2 1971).

[7] A number of lower federal courts have similarly recognized that educators' decisions with regard to the content of school-sponsored newspapers, dramatic productions, and other expressive activities are entitled to substantial deference. See, *e. g.*, *Nicholson* v. *Board of Education, Torrance Unified School Dist.*, 682 F. 2d 858 (CA9 1982); *Seyfried* v. *Wal-*

III

We also conclude that Principal Reynolds acted reasonably in requiring the deletion from the May 13 issue of Spectrum of the pregnancy article, the divorce article, and the remaining articles that were to appear on the same pages of the newspaper.

The initial paragraph of the pregnancy article declared that "[a]ll names have been changed to keep the identity of these girls a secret." The principal concluded that the students' anonymity was not adequately protected, however, given the other identifying information in the article and the small number of pregnant students at the school. Indeed, a teacher at the school credibly testified that she could positively identify at least one of the girls and possibly all three. It is likely that many students at Hazelwood East would have been at least as successful in identifying the girls. Reynolds therefore could reasonably have feared that the article violated whatever pledge of anonymity had been given to the pregnant students. In addition, he could reasonably have been concerned that the article was not sufficiently sensitive to the privacy interests of the students' boyfriends and parents, who were discussed in the article but who were given no opportunity to consent to its publication or to offer a response. The article did not contain graphic accounts of sexual activity. The girls did comment in the article, however, concerning their sexual histories and their use or nonuse of birth control. It was not unreasonable for the principal to have concluded that such frank talk was inappropriate in a school-sponsored publication distributed to 14-year-old fresh-

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ton, 668 F. 2d 214 (CA3 1981); *Trachtman* v. *Anker*, 563 F. 2d 512 (CA2 1977), cert. denied, 435 U. S. 925 (1978); *Frasca* v. *Andrews*, 463 F. Supp. 1043 (EDNY 1979). We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.

men and presumably taken home to be read by students' even younger brothers and sisters.

The student who was quoted by name in the version of the divorce article seen by Principal Reynolds made comments sharply critical of her father. The principal could reasonably have concluded that an individual publicly identified as an inattentive parent—indeed, as one who chose "playing cards with the guys" over home and family—was entitled to an opportunity to defend himself as a matter of journalistic fairness. These concerns were shared by both of Spectrum's faculty advisers for the 1982–1983 school year, who testified that they would not have allowed the article to be printed without deletion of the student's name.[8]

Principal Reynolds testified credibly at trial that, at the time that he reviewed the proofs of the May 13 issue during an extended telephone conversation with Emerson, he believed that there was no time to make any changes in the articles, and that the newspaper had to be printed immediately or not at all. It is true that Reynolds did not verify whether the necessary modifications could still have been made in the articles, and that Emerson did not volunteer the information that printing could be delayed until the changes were made. We nonetheless agree with the District Court that the decision to excise the two pages containing the problematic articles was reasonable given the particular circumstances of this case. These circumstances included the very recent

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[8] The reasonableness of Principal Reynolds' concerns about the two articles was further substantiated by the trial testimony of Martin Duggan, a former editorial page editor of the St. Louis Globe Democrat and a former college journalism instructor and newspaper adviser. Duggan testified that the divorce story did not meet journalistic standards of fairness and balance because the father was not given an opportunity to respond, and that the pregnancy story was not appropriate for publication in a high school newspaper because it was unduly intrusive into the privacy of the girls, their parents, and their boyfriends. The District Court found Duggan to be "an objective and independent witness" whose testimony was entitled to significant weight. 607 F. Supp. 1450, 1461 (ED Mo. 1985).

replacement of Stergos by Emerson, who may not have been entirely familiar with Spectrum editorial and production procedures, and the pressure felt by Reynolds to make an immediate decision so that students would not be deprived of the newspaper altogether.

In sum, we cannot reject as unreasonable Principal Reynolds' conclusion that neither the pregnancy article nor the divorce article was suitable for publication in Spectrum. Reynolds could reasonably have concluded that the students who had written and edited these articles had not sufficiently mastered those portions of the Journalism II curriculum that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals whose most intimate concerns are to be revealed in the newspaper, and "the legal, moral, and ethical restrictions imposed upon journalists within [a] school community" that includes adolescent subjects and readers. Finally, we conclude that the principal's decision to delete two pages of Spectrum, rather than to delete only the offending articles or to require that they be modified, was reasonable under the circumstances as he understood them. Accordingly, no violation of First Amendment rights occurred.[9]

The judgment of the Court of Appeals for the Eighth Circuit is therefore

Reversed.

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[9] It is likely that the approach urged by the dissent would as a practical matter have far more deleterious consequences for the student press than does the approach that we adopt today. The dissent correctly acknowledges "[t]he State's prerogative to dissolve the student newspaper entirely." *Post*, at 287. It is likely that many public schools would do just that rather than open their newspapers to all student expression that does not threaten "materia[l] disrup[tion of] classwork" or violation of "rights that are protected by law," *post*, at 289, regardless of how sexually explicit, racially intemperate, or personally insulting that expression otherwise might be.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

When the young men and women of Hazelwood East High School registered for Journalism II, they expected a civics lesson. Spectrum, the newspaper they were to publish, "was not just a class exercise in which students learned to prepare papers and hone writing skills, it was a . . . forum established to give students an opportunity to express their views while gaining an appreciation of their rights and responsibilities under the First Amendment to the United States Constitution . . . ." 795 F. 2d 1368, 1373 (CA8 1986). "[A]t the beginning of each school year," *id.*, at 1372, the student journalists published a Statement of Policy—tacitly approved each year by school authorities—announcing their expectation that "*Spectrum*, as a student-press publication, accepts all rights implied by the First Amendment . . . . Only speech that 'materially and substantially interferes with the requirements of appropriate discipline' can be found unacceptable and therefore prohibited." App. 26 (quoting *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 513 (1969)).[1] The school board itself affirmatively guaranteed the students of Journalism II an atmosphere conducive to fostering such an appreciation and exercising the full panoply of rights associated with a free student press. "School sponsored student publications," it vowed, "will not restrict free expression or diverse viewpoints within the rules of responsible journalism." App. 22 (Board Policy 348.51).

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[1] The Court suggests that the passage quoted in the text did not "exten[d] the *Tinker* standard to the news and feature articles contained in a school-sponsored newspaper" because the passage did not expressly mention them. *Ante*, at 269, n. 2. It is hard to imagine why the Court (or anyone else) might expect a passage that applies categorically to "a student-press publication," composed almost exclusively of "news and feature articles," to mention those categories expressly. Understandably, neither court below so limited the passage.

This case arose when the Hazelwood East administration breached its own promise, dashing its students' expectations. The school principal, without prior consultation or explanation, excised six articles—comprising two full pages—of the May 13, 1983, issue of Spectrum. He did so not because any of the articles would "materially and substantially interfere with the requirements of appropriate discipline," but simply because he considered two of the six "inappropriate, personal, sensitive, and unsuitable" for student consumption. 795 F. 2d, at 1371.

In my view the principal broke more than just a promise. He violated the First Amendment's prohibitions against censorship of any student expression that neither disrupts classwork nor invades the rights of others, and against any censorship that is not narrowly tailored to serve its purpose.

I

Public education serves vital national interests in preparing the Nation's youth for life in our increasingly complex society and for the duties of citizenship in our democratic Republic. See *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954). The public school conveys to our young the information and tools required not merely to survive in, but to contribute to, civilized society. It also inculcates in tomorrow's leaders the "fundamental values necessary to the maintenance of a democratic political system . . . ." *Ambach* v. *Norwick*, 441 U. S. 68, 77 (1979). All the while, the public educator nurtures students' social and moral development by transmitting to them an official dogma of "'community values.'" *Board of Education* v. *Pico*, 457 U. S. 853, 864 (1982) (plurality opinion) (citation omitted).

The public educator's task is weighty and delicate indeed. It demands particularized and supremely subjective choices among diverse curricula, moral values, and political stances to teach or inculcate in students, and among various methodologies for doing so. Accordingly, we have traditionally re-

served the "daily operation of school systems" to the States and their local school boards. *Epperson* v. *Arkansas*, 393 U. S. 97, 104 (1968); see *Board of Education* v. *Pico*, *supra*, at 863–864. We have not, however, hesitated to intervene where their decisions run afoul of the Constitution. See *e. g.*, *Edwards* v. *Aguillard*, 482 U. S. 578 (1987) (striking state statute that forbade teaching of evolution in public school unless accompanied by instruction on theory of "creation science"); *Board of Education* v. *Pico*, *supra* (school board may not remove books from library shelves merely because it disapproves of ideas they express); *Epperson* v. *Arkansas*, *supra* (striking state-law prohibition against teaching Darwinian theory of evolution in public school); *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624 (1943) (public school may not compel student to salute flag); *Meyer* v. *Nebraska*, 262 U. S. 390 (1923) (state law prohibiting the teaching of foreign languages in public or private schools is unconstitutional).

Free student expression undoubtedly sometimes interferes with the effectiveness of the school's pedagogical functions. Some brands of student expression do so by directly preventing the school from pursuing its pedagogical mission: The young polemic who stands on a soapbox during calculus class to deliver an eloquent political diatribe interferes with the legitimate teaching of calculus. And the student who delivers a lewd endorsement of a student-government candidate might so extremely distract an impressionable high school audience as to interfere with the orderly operation of the school. See *Bethel School Dist. No. 403* v. *Fraser*, 478 U. S. 675 (1986). Other student speech, however, frustrates the school's legitimate pedagogical purposes merely by expressing a message that conflicts with the school's, without directly interfering with the school's expression of its message: A student who responds to a political science teacher's question with the retort, "socialism is good," subverts the school's inculcation of the message that capitalism is better.

Even the maverick who sits in class passively sporting a symbol of protest against a government policy, cf. *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503 (1969), or the gossip who sits in the student commons swapping stories of sexual escapade could readily muddle a clear official message condoning the government policy or condemning teenage sex. Likewise, the student newspaper that, like Spectrum, conveys a moral position at odds with the school's official stance might subvert the administration's legitimate inculcation of its own perception of community values.

If mere incompatibility with the school's pedagogical message were a constitutionally sufficient justification for the suppression of student speech, school officials could censor each of the students or student organizations in the foregoing hypotheticals, converting our public schools into "enclaves of totalitarianism," *id.*, at 511, that "strangle the free mind at its source," *West Virginia Board of Education* v. *Barnette*, *supra*, at 637. The First Amendment permits no such blanket censorship authority. While the "constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," *Fraser*, *supra*, at 682, students in the public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker*, *supra*, at 506. Just as the public on the street corner must, in the interest of fostering "enlightened opinion," *Cantwell* v. *Connecticut*, 310 U. S. 296, 310 (1940), tolerate speech that "tempt[s] [the listener] to throw [the speaker] off the street," *id.*, at 309, public educators must accommodate some student expression even if it offends them or offers views or values that contradict those the school wishes to inculcate.

In *Tinker*, this Court struck the balance. We held that official censorship of student expression—there the suspension of several students until they removed their armbands protesting the Vietnam war—is unconstitutional unless the

speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others . . . ." 393 U. S., at 513. School officials may not suppress "silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of" the speaker. *Id.*, at 508. The "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," *id.*, at 509, or an unsavory subject, *Fraser*, *supra*, at 688–689 (BRENNAN, J., concurring in judgment), does not justify official suppression of student speech in the high school.

This Court applied the *Tinker* test just a Term ago in *Fraser*, *supra*, upholding an official decision to discipline a student for delivering a lewd speech in support of a student-government candidate. The Court today casts no doubt on *Tinker*'s vitality. Instead it erects a taxonomy of school censorship, concluding that *Tinker* applies to one category and not another. On the one hand is censorship "to silence a student's personal expression that happens to occur on the school premises." *Ante*, at 271. On the other hand is censorship of expression that arises in the context of "school-sponsored . . . expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Ibid.*

The Court does not, for it cannot, purport to discern from our precedents the distinction it creates. One could, I suppose, readily characterize the students' symbolic speech in *Tinker* as "personal expression that happens to [have] occur[red] on school premises," although *Tinker* did not even hint that the personal nature of the speech was of any (much less dispositive) relevance. But that same description could not by any stretch of the imagination fit Fraser's speech. He did not just "happen" to deliver his lewd speech to an ad hoc gathering on the playground. As the second paragraph of *Fraser* evinces, if ever a forum for student expression was "school-sponsored," Fraser's was:

> "Fraser . . . delivered a speech nominating a fellow student for student elective office. Approximately 600 high school students . . . attended the assembly. Students were required to attend the assembly or to report to the study hall. The assembly was part of a *school-sponsored* educational program in self-government." *Fraser*, 478 U. S., at 677 (emphasis added).

Yet, from the first sentence of its analysis, see *id.*, at 680, *Fraser* faithfully applied *Tinker*.

Nor has this Court ever intimated a distinction between personal and school-sponsored speech in any other context. Particularly telling is this Court's heavy reliance on *Tinker* in two cases of First Amendment infringement on state college campuses. See *Papish* v. *University of Missouri Board of Curators*, 410 U. S. 667, 671, n. 6 (1973) *(per curiam)*; *Healy* v. *James*, 408 U. S. 169, 180, 189, and n. 18, 191 (1972). One involved the expulsion of a student for lewd expression in a newspaper that she sold on campus pursuant to university authorization, see *Papish*, *supra*, at 667–668, and the other involved the denial of university recognition and concomitant benefits to a political student organization, see *Healy*, *supra*, at 174, 176, 181–182. Tracking *Tinker*'s analysis, the Court found each act of suppression unconstitutional. In neither case did this Court suggest the distinction, which the Court today finds dispositive, between school-sponsored and incidental student expression.

II

Even if we were writing on a clean slate, I would reject the Court's rationale for abandoning *Tinker* in this case. The Court offers no more than an obscure tangle of three excuses to afford educators "greater control" over school-sponsored speech than the *Tinker* test would permit: the public educator's prerogative to control curriculum; the pedagogical interest in shielding the high school audience from objectionable viewpoints and sensitive topics; and the school's need

to dissociate itself from student expression. *Ante*, at 271. None of the excuses, once disentangled, supports the distinction that the Court draws. *Tinker* fully addresses the first concern; the second is illegitimate; and the third is readily achievable through less oppressive means.

A

The Court is certainly correct that the First Amendment permits educators "to assure that participants learn whatever lessons the activity is designed to teach . . . ." *Ante*, at 271. That is, however, the essence of the *Tinker* test, not an excuse to abandon it. Under *Tinker*, school officials may censor only such student speech as would "materially disrup[t]" a legitimate curricular function. Manifestly, student speech is more likely to disrupt a curricular function when it arises in the context of a curricular activity—one that "is designed to teach" something—than when it arises in the context of a noncurricular activity. Thus, under *Tinker*, the school may constitutionally punish the budding political orator if he disrupts calculus class but not if he holds his tongue for the cafeteria. See *Consolidated Edison Co.* v. *Public Service Comm'n of New York*, 447 U. S. 530, 544–545 (1980) (STEVENS, J., concurring in judgment). That is not because some more stringent standard applies in the curricular context. (After all, this Court applied the same standard whether the students in *Tinker* wore their armbands to the "classroom" or the "cafeteria." 393 U. S., at 512.) It is because student speech in the noncurricular context is less likely to disrupt materially any legitimate pedagogical purpose.

I fully agree with the Court that the First Amendment should afford an educator the prerogative not to sponsor the publication of a newspaper article that is "ungrammatical, poorly written, inadequately researched, biased or prejudiced," or that falls short of the "high standards for . . . student speech that is disseminated under [the school's] auspices . . . ." *Ante*, at 271–272. But we need not abandon *Tinker*

to reach that conclusion; we need only apply it. The enumerated criteria reflect the skills that the curricular newspaper "is designed to teach." The educator may, under *Tinker*, constitutionally "censor" poor grammar, writing, or research because to reward such expression would "materially disrup[t]" the newspaper's curricular purpose.

The same cannot be said of official censorship designed to shield the *audience* or dissociate the *sponsor* from the expression. Censorship so motivated might well serve (although, as I demonstrate *infra*, at 285–289, cannot legitimately serve) some other school purpose. But it in no way furthers the curricular purposes of a student *newspaper*, unless one believes that the purpose of the school newspaper is to teach students that the press ought never report bad news, express unpopular views, or print a thought that might upset its sponsors. Unsurprisingly, Hazelwood East claims no such pedagogical purpose.

The Court relies on bits of testimony to portray the principal's conduct as a pedagogical lesson to Journalism II students who "had not sufficiently mastered those portions of the . . . curriculum that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals . . . , and 'the legal, moral, and ethical restrictions imposed upon journalists . . . .'" *Ante*, at 276. In that regard, the Court attempts to justify censorship of the article on teenage pregnancy on the basis of the principal's judgment that (1) "the [pregnant] students' anonymity was not adequately protected," despite the article's use of aliases; and (2) the judgment that "the article was not sufficiently sensitive to the privacy interests of the students' boyfriends and parents . . . ." *Ante*, at 274. Similarly, the Court finds in the principal's decision to censor the divorce article a journalistic lesson that the author should have given the father of one student an "opportunity to defend himself" against her charge that (in the Court's words) he "chose

'playing cards with the guys' over home and family . . . ." *Ante*, at 275.

But the principal never consulted the students before censoring their work. "[T]hey learned of the deletions when the paper was released . . . ." 795 F. 2d, at 1371. Further, he explained the deletions only in the broadest of generalities. In one meeting called at the behest of seven protesting Spectrum staff members (presumably a fraction of the full class), he characterized the articles as "'too sensitive' for 'our immature audience of readers,'" 607 F. Supp. 1450, 1459 (ED Mo. 1985), and in a later meeting he deemed them simply "inappropriate, personal, sensitive and unsuitable for the newspaper," *ibid.* The Court's supposition that the principal intended (or the protesters understood) those generalities as a lesson on the nuances of journalistic responsibility is utterly incredible. If he did, a fact that neither the District Court nor the Court of Appeals found, the lesson was lost on all but the psychic Spectrum staffer.

B

The Court's second excuse for deviating from precedent is the school's interest in shielding an impressionable high school audience from material whose substance is "unsuitable for immature audiences." *Ante*, at 271 (footnote omitted). Specifically, the majority decrees that we must afford educators authority to shield high school students from exposure to "potentially sensitive topics" (like "the particulars of teenage sexual activity") or unacceptable social viewpoints (like the advocacy of "irresponsible se[x] or conduct otherwise inconsistent with 'the shared values of a civilized social order'") through school-sponsored student activities. *Ante*, at 272 (citation omitted).

Tinker teaches us that the state educator's undeniable, and undeniably vital, mandate to inculcate moral and political values is not a general warrant to act as "thought police" stifling discussion of all but state-approved topics and advocacy of all

but the official position. See also *Epperson* v. *Arkansas*, 393 U. S. 97 (1968); *Meyer* v. *Nebraska*, 262 U. S. 390 (1923). Otherwise educators could transform students into "closed-circuit recipients of only that which the State chooses to communicate," *Tinker*, 393 U. S., at 511, and cast a perverse and impermissible "pall of orthodoxy over the classroom," *Keyishian* v. *Board of Regents*, 385 U. S. 589, 603 (1967). Thus, the State cannot constitutionally prohibit its high school students from recounting in the locker room "the particulars of [their] teen-age sexual activity," nor even from advocating "irresponsible se[x]" or other presumed abominations of "the shared values of a civilized social order." Even in its capacity as educator the State may not assume an Orwellian "guardianship of the public mind," *Thomas* v. *Collins*, 323 U. S. 516, 545 (1945) (Jackson, J., concurring).

The mere fact of school sponsorship does not, as the Court suggests, license such thought control in the high school, whether through school suppression of disfavored viewpoints or through official assessment of topic sensitivity.[2] The former would constitute unabashed and unconstitutional view-

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[2] The Court quotes language in *Bethel School Dist. No. 403* v. *Fraser*, 478 U. S. 675 (1986), for the proposition that " '[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.' " *Ante*, at 267 (quoting 478 U. S., at 683). As the discussion immediately preceding that quotation makes clear, however, the Court was referring only to the appropriateness of the *manner* in which the message is conveyed, not of the message's *content*. See, *e. g.*, *Fraser*, 478 U. S., at 683 ("[T]he 'fundamental values necessary to the maintenance of a democratic political system' disfavor the use of terms of debate highly offensive or highly threatening to others"). In fact, the *Fraser* Court coupled its first mention of "society's . . . interest in teaching students the boundaries of *socially appropriate behavior*," with an acknowledgment of "[t]he undoubted freedom to advocate unpopular and controversial views in schools and *classrooms*," *id.*, at 681 (emphasis added). See also *id.*, at 689 (BRENNAN, J., concurring in judgment) ("Nor does this case involve an attempt by school officials to ban written materials they consider 'inappropriate' for high school students" (citation omitted)).

point discrimination, see *Board of Education* v. *Pico*, 457 U. S., at 878–879 (BLACKMUN, J., concurring in part and concurring in judgment), as well as an impermissible infringement of the students' "'right to receive information and ideas,'" *id.*, at 867 (plurality opinion) (citations omitted); see *First National Bank* v. *Bellotti*, 435 U. S. 765, 783 (1978).[3] Just as a school board may not purge its state-funded library of all books that "'offen[d] [its] social, political and moral tastes,'" 457 U. S., at 858–859 (plurality opinion) (citation omitted), school officials may not, out of like motivation, discriminatorily excise objectionable ideas from a student publication. The State's prerogative to dissolve the student newspaper entirely (or to limit its subject matter) no more entitles it to dictate which viewpoints students may express on its pages, than the State's prerogative to close down the schoolhouse entitles it to prohibit the nondisruptive expression of antiwar sentiment within its gates.

Official censorship of student speech on the ground that it addresses "potentially sensitive topics" is, for related reasons, equally impermissible. I would not begrudge an educator the authority to limit the substantive scope of a school-sponsored publication to a certain, objectively definable topic, such as literary criticism, school sports, or an overview of the school year. Unlike those determinate limitations, "potential topic sensitivity" is a vaporous nonstandard—like "'public welfare, peace, safety, health, decency, good order, morals or convenience,'" *Shuttlesworth* v. *Birmingham*, 394 U. S. 147, 150 (1969), or "'general welfare of citizens,'" *Staub* v. *Baxley*, 355 U. S. 313, 322 (1958)—that invites manipulation to achieve ends that cannot permissibly be achieved through blatant viewpoint discrimination and chills student speech to which school officials might not

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[3] Petitioners themselves concede that "'[c]ontrol over access'" to Spectrum is permissible only if "'the distinctions drawn . . . are viewpoint neutral.'" Brief for Petitioners 32 (quoting *Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc.*, 473 U. S. 788, 806 (1985)).

object. In part because of those dangers, this Court has consistently condemned any scheme allowing a state official boundless discretion in licensing speech from a particular forum. See, *e. g.*, *Shuttlesworth* v. *Birmingham*, *supra*, at 150–151, and n. 2; *Cox* v. *Louisiana*, 379 U. S. 536, 557–558 (1965); *Staub* v. *Baxley*, *supra*, at 322–324.

The case before us aptly illustrates how readily school officials (and courts) can camouflage viewpoint discrimination as the "mere" protection of students from sensitive topics. Among the grounds that the Court advances to uphold the principal's censorship of one of the articles was the potential sensitivity of "teenage sexual activity." *Ante*, at 272. Yet the District Court specifically found that the principal "did not, as a matter of principle, oppose discussion of said topi[c] in *Spectrum*." 607 F. Supp., at 1467. That much is also clear from the same principal's approval of the "squeal law" article on the same page, dealing forthrightly with "teenage sexuality," "the use of contraceptives by teenagers," and "teenage pregnancy," App. 4–5. If topic sensitivity were the true basis of the principal's decision, the two articles should have been equally objectionable. It is much more likely that the objectionable article was objectionable because of the viewpoint it expressed: It might have been read (as the majority apparently does) to advocate "irresponsible sex." See *ante*, at 272.

C

The sole concomitant of school sponsorship that might conceivably justify the distinction that the Court draws between sponsored and nonsponsored student expression is the risk "that the views of the individual speaker [might be] erroneously attributed to the school." *Ante*, at 271. Of course, the risk of erroneous attribution inheres in any student expression, including "personal expression" that, like the armbands in *Tinker*, "happens to occur on the school premises," *ante*, at 271. Nevertheless, the majority is certainly correct that indicia of school sponsorship increase the likelihood

of such attribution, and that state educators may therefore have a legitimate interest in dissociating themselves from student speech.

But "'[e]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'" *Keyishian* v. *Board of Regents*, 385 U. S., at 602 (quoting *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960)). Dissociative means short of censorship are available to the school. It could, for example, require the student activity to publish a disclaimer, such as the "Statement of Policy" that Spectrum published each school year announcing that "[a]ll . . . editorials appearing in this newspaper reflect the opinions of the *Spectrum* staff, which are not necessarily shared by the administrators or faculty of Hazelwood East," App. 26; or it could simply issue its own response clarifying the official position on the matter and explaining why the student position is wrong. Yet, without so much as acknowledging the less oppressive alternatives, the Court approves of brutal censorship.

III

Since the censorship served no legitimate pedagogical purpose, it cannot by any stretch of the imagination have been designed to prevent "materia[l] disrup[tion of] classwork," *Tinker*, 393 U. S., at 513. Nor did the censorship fall within the category that *Tinker* described as necessary to prevent student expression from "inva[ding] the rights of others," *ibid.* If that term is to have any content, it must be limited to rights that are protected by law. "Any yardstick less exacting than [that] could result in school officials curtailing speech at the slightest fear of disturbance," 795 F. 2d, at 1376, a prospect that would be completely at odds with this Court's pronouncement that the "undifferentiated fear or apprehension of disturbance is not enough [even in the public school context] to overcome the right to freedom of expres-

sion." *Tinker*, *supra*, at 508. And, as the Court of Appeals correctly reasoned, whatever journalistic impropriety these articles may have contained, they could not conceivably be tortious, much less criminal. See 795 F. 2d, at 1375–1376.

Finally, even if the majority were correct that the principal could constitutionally have censored the objectionable material, I would emphatically object to the brutal manner in which he did so. Where "[t]he separation of legitimate from illegitimate speech calls for more sensitive tools" *Speiser* v. *Randall*, 357 U. S. 513, 525 (1958); see *Keyishian* v. *Board of Regents*, *supra*, at 602, the principal used a paper shredder. He objected to some material in two articles, but excised six entire articles. He did not so much as inquire into obvious alternatives, such as precise deletions or additions (one of which had already been made), rearranging the layout, or delaying publication. Such unthinking contempt for individual rights is intolerable from any state official. It is particularly insidious from one to whom the public entrusts the task of inculcating in its youth an appreciation for the cherished democratic liberties that our Constitution guarantees.

IV

The Court opens its analysis in this case by purporting to reaffirm *Tinker*'s time-tested proposition that public school students "do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Ante*, at 266 (quoting *Tinker*, *supra*, at 506). That is an ironic introduction to an opinion that denudes high school students of much of the First Amendment protection that *Tinker* itself prescribed. Instead of "teach[ing] children to respect the diversity of ideas that is fundamental to the American system," *Board of Education* v. *Pico*, 457 U. S., at 880 (BLACKMUN, J., concurring in part and concurring in judgment), and "that our Constitution is a living reality, not parchment preserved under glass," *Shanley* v. *Northeast Independent School Dist., Bexar Cty., Tex.*, 462 F. 2d 960, 972 (CA5

1972), the Court today "teach[es] youth to discount important principles of our government as mere platitudes." *West Virginia Board of Education* v. *Barnette*, 319 U. S., at 637. The young men and women of Hazelwood East expected a civics lesson, but not the one the Court teaches them today.

I dissent.

WESTFALL ET AL. *v.* ERWIN ET UX.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 86–714. Argued November 2, 1987—Decided January 13, 1988

Respondents, husband and wife, brought a state-law tort suit in state court alleging that, while working as a federal civilian employee at an Army Depot, the husband received chemical burns when he was exposed to toxic soda ash that was improperly stored at the depot as a result of the negligence of petitioner supervisors. The Federal District Court to which petitioners removed the action held that petitioners were absolutely immune from suit since the alleged tort was committed while they were acting within the scope of their employment, and granted summary judgment in their favor. The Court of Appeals reversed, holding that a federal employee enjoys immunity only if the challenged conduct, in addition to being within the scope of the employee's duties, is also a discretionary act.

Held: Conduct by federal officials must be discretionary in nature, as well as being within the scope of their employment, before the conduct is absolutely immune from state-law tort liability. See *Doe* v. *McMillan*, 412 U. S. 306. Granting absolute immunity for nondiscretionary functions would not further the official immunity doctrine's central purpose of promoting effective government by insulating the decisionmaking process from the harassment of prospective litigation which could make federal officials unduly timid in carrying out their duties. The threat of tort liability cannot detrimentally inhibit conduct that is not the product of independent judgment, and it is only when officials exercise decisionmaking discretion that potential liability may shackle the fearless, vigorous, and effective administration of governmental policies. Petitioners' alternative argument that the discretionary function requirement is satisfied if the precise conduct of the federal official is not prescribed by law and the official exercises "minimal discretion" is rejected. This approach loses sight of the underlying purpose of the official immunity doctrine by ignoring the balance of potential benefits and costs under the circumstances, and, if adopted, would render the discretionary function requirement essentially meaningless. Virtually all official acts involve some modicum of choice and yet such acts will often be largely unaffected by the prospect of tort liability, thereby making the provision of absolute immunity unnecessary and unwise. Here, since no evidence was presented controverting respondents' assertion that petitioners were not in-

volved in discretionary conduct, there is a genuine issue of material fact as to whether that conduct is entitled to absolute immunity, and the Court of Appeals was correct in reversing the grant of summary judgment. Pp. 295–300.

785 F. 2d 1551, affirmed.

MARSHALL, J., delivered the opinion for a unanimous Court.

Deputy Solicitor General Ayer argued the cause for petitioners. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Willard, Andrew J. Pincus, Barbara L. Herwig,* and *Larry L. Gregg.*

M. Clay Alspaugh argued the cause and filed a brief for respondents.

JUSTICE MARSHALL delivered the opinion of the Court.

Respondent William Erwin and his wife respondent Emely Erwin brought a state-law tort suit against petitioners, federal employees in the Executive Branch, alleging that he had suffered injuries as a result of petitioners' negligence in performing official acts. The issue presented is whether these federal officials are absolutely immune from liability under state tort law for conduct within the scope of their employment without regard to whether the challenged conduct was discretionary in nature.

I

Respondents William and Emely Erwin commenced this tort action in state court. At the time of the alleged tort, William Erwin was employed by the Federal Government as a civilian warehouseman at the Anniston Army Depot in Anniston, Alabama. Petitioners were supervisors at the Depot.[1] Respondents' complaint alleged that while working at the Depot William Erwin came into contact with bags of

[1] Petitioner Westfall was the chief of the Receiving Section at the Depot, petitioner Rutledge was the chief of the Breakdown and Bulk Delivery Unit, and petitioner Bell was the chief of Unloading Unit No. 1. 1 Record, Exh. A, p. 1.

toxic soda ash that "were improperly and negligently stored." 1 Record, Complaint ¶3. The complaint stated that William Erwin suffered chemical burns to his eyes and throat when he inhaled soda ash dust that had spilled from its bag. William Erwin also asserted that the soda ash "should not have been routed to the warehouse where [he] was working," and that "someone should have known that it was there and provided [him] with some warning as to its presence and danger before [he] inhaled it." 1 Record, Doc. No. 4, p. 1. The complaint charged petitioners with negligence "in proximately causing, permitting, or allowing [him] to inhale the . . . soda ash." 1 Record, Complaint ¶6.

Petitioners removed the action to the United States District Court for the Northern District of Alabama pursuant to 28 U. S. C. §1442(a)(1). The District Court held that petitioners were absolutely immune from suit and granted summary judgment in their favor. After finding that the alleged tort was committed while petitioners were acting within the scope of their employment, the court held that "any federal employee is entitled to absolute immunity for ordinary torts committed within the scope of their jobs." Civ. Action No. CV85–H–874–S, p. 2 (June 5, 1985). The Court of Appeals reversed, reasoning that a federal employee enjoys immunity "'only if the challenged conduct is a discretionary act *and* is within the outer perimeter of the actor's line of duty.'" 785 F. 2d 1551, 1552 (CA11 1986) (quoting *Johns* v. *Pettibone Corp.*, 769 F. 2d 724, 728 (CA11 1985)). The court held that the District Court erred in failing to consider whether the challenged conduct was discretionary, in addition to being within the scope of petitioners' duties, before finding that petitioners were absolutely immune from suit. Summary judgment was inappropriate, the court concluded, because respondents had "alleged undisputed facts sufficient to create a material question of whether or not [petitioners'] complained-of acts were discretionary." 785 F. 2d, at 1553.

We granted certiorari, 480 U. S. 905 (1987), to resolve the dispute among the Courts of Appeals as to whether conduct by federal officials must be discretionary in nature, as well as being within the scope of their employment, before the conduct is absolutely immune from state-law tort liability.[2] We affirm.

II

In *Barr* v. *Matteo*, 360 U. S. 564 (1959), and *Howard* v. *Lyons*, 360 U. S. 593 (1959), this Court held that the scope of absolute official immunity afforded federal employees is a matter of federal law, "to be formulated by the courts in the absence of legislative action by Congress." *Id.*, at 597. The purpose of such official immunity is not to protect an erring official, but to insulate the decisionmaking process from the harassment of prospective litigation. The provision of immunity rests on the view that the threat of liability will make federal officials unduly timid in carrying out their official duties, and that effective government will be promoted if officials are freed of the costs of vexatious and often frivolous damages suits. See *Barr* v. *Matteo*, *supra*, at 571; *Doe* v. *McMillan*, 412 U. S. 306, 319 (1973). This Court always has recognized, however, that official immunity comes at a great cost. An injured party with an otherwise meritorious tort claim is denied compensation simply because he had the misfortune to be injured by a federal official. Moreover, absolute immunity contravenes the basic tenet that individuals be held accountable for their wrongful conduct. We therefore have held that absolute immunity for federal officials is justified only when "the contributions of immunity to effective

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[2] Compare *General Electric Co.* v. *United States*, 813 F. 2d 1273, 1276–1277 (CA4 1987), and *Poolman* v. *Nelson*, 802 F. 2d 304, 307 (CA8 1986) (federal officials absolutely immune from state-law tort suits for conduct within the scope of their employment), with *Johns* v. *Pettibone Corp.*, 769 F. 2d 724, 728 (CA11 1985), and *Araujo* v. *Welch*, 742 F. 2d 802, 804 (CA3 1984) (federal official's conduct absolutely immune only if within scope of employment *and* discretionary).

government in particular contexts outweigh the perhaps recurring harm to individual citizens." *Doe* v. *McMillan*, *supra*, at 320.[3]

Petitioners initially ask that we endorse the approach followed by the Fourth and Eighth Circuits, see *General Electric Co.* v. *United States*, 813 F. 2d 1273, 1276–1277 (CA4 1987); *Poolman* v. *Nelson*, 802 F. 2d 304, 307 (CA8 1986), and by the District Court in the present action, that all federal employees are absolutely immune from suits for damages under state tort law "whenever their conduct falls within the scope of their official duties." Brief for Petitioners 12. Petitioners argue that such a rule would have the benefit of eliminating uncertainty as to the scope of absolute immunity for state-law tort actions, and would most effectively ensure that federal officials act free of inhibition. Neither the purposes of the doctrine of official immunity nor our cases support such a broad view of the scope of absolute immunity, however, and we refuse to adopt this position.

The central purpose of official immunity, promoting effective government, would not be furthered by shielding an official from state-law tort liability without regard to whether the alleged tortious conduct is discretionary in nature. When an official's conduct is not the product of independent judgment, the threat of liability cannot detrimentally inhibit

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[3] In determining the propriety of shielding an official from suit under the circumstances, this Court has long favored a "functional" inquiry—immunity attaches to particular official functions, not to particular offices. See, *e. g.*, *Forrester* v. *White*, *ante*, at 224; *Harlow* v. *Fitzgerald*, 457 U. S. 800, 811–812 (1982); *Doe* v. *McMillan*, 412 U. S., at 319–320; *Barr* v. *Matteo*, 360 U. S. 564, 572–573 (1959). The adoption of this functional approach reflects the Court's concern, expressed in *Doe*, that federal officials be granted absolute immunity only insofar as the benefits of immunity outweigh the costs. Because the benefits of official immunity lie principally in avoiding disruption of governmental functions, the inquiry into whether absolute immunity is warranted in a particular context depends on the degree to which the official function would suffer under the threat of prospective litigation.

that conduct. It is only when officials exercise decisionmaking discretion that potential liability may shackle "the fearless, vigorous, and effective administration of policies of government." *Barr* v. *Matteo*, *supra*, at 571. Because it would not further effective governance, absolute immunity for nondiscretionary functions finds no support in the traditional justification for official immunity.

Moreover, in *Doe* v. *McMillan*, *supra*, we explicitly rejected the suggestion that official immunity attaches solely because conduct is within the outer perimeter of an official's duties. *Doe* involved a damages action for both constitutional violations and common-law torts against the Public Printer and the Superintendent of Documents arising out of the public distribution of a congressional committee's report. After recognizing that the distribution of documents was "'within the outer perimeter' of the statutory duties of the Public Printer and the Superintendent of Documents," the Court stated: "[I]f official immunity automatically attaches to any conduct expressly or impliedly authorized by law, the Court of Appeals correctly dismissed the complaint against these officials. This, however, is not the governing rule." *Id.*, at 322. The Court went on to evaluate the level of discretion exercised by these officials, finding that they "exercise discretion only with respect to estimating the demand for particular documents and adjusting the supply accordingly." *Id.*, at 323. The Court rejected the claim that these officials enjoyed absolute immunity for all their official acts, and held instead that the officials were immune from suit only to the extent that the Government officials ordering the printing would be immune for the same conduct. See *id.*, at 323–324. The key importance of *Doe* lies in its analysis of discretion as a critical factor in evaluating the legitimacy of official immunity. As *Doe*'s analysis makes clear, absolute immunity from state-law tort actions should be available only when the conduct of federal officials is within the scope

of their official duties *and* the conduct is discretionary in nature.[4]

As an alternative position, petitioners contend that even if discretion is required before absolute immunity attaches, the requirement is satisfied as long as the official exercises "minimal discretion." Brief for Petitioners 15. If the precise conduct is not mandated by law, petitioners argue, then the act is "discretionary" and the official is entitled to absolute immunity from state-law tort liability. We reject such a wooden interpretation of the discretionary function requirement. Because virtually all official acts involve some modicum of choice, petitioners' reading of the requirement would render it essentially meaningless. Furthermore, by focusing entirely on the question whether a federal official's precise conduct is controlled by law or regulation, petitioners' approach ignores the balance of potential benefits and costs of absolute immunity under the circumstances and thus loses sight of the underlying purpose of official immunity doctrine. See *Doe* v. *McMillan*, 412 U. S., at 320. Conduct by federal officials will often involve the exercise of a modicum of choice and yet be largely unaffected by the prospect of tort liability, making the provision of absolute immunity unnecessary and unwise.

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[4] We recognize that the plurality opinion in *Barr* v. *Matteo*, *supra*, contained language that has led some courts to believe that conduct within the outer perimeter of an official's duties is automatically immune from suit. See, *e. g.*, *Poolman* v. *Nelson*, 802 F. 2d, at 307–308. A close reading of *Barr*, however, shows that the discretionary nature of the act challenged in that case was central to Justice Harlan's opinion. Justice Harlan specifically noted that the conduct in question "was an appropriate exercise of discretion which an officer of that rank must possess if the public service is to function effectively" and that immunity applies "to discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority." 360 U. S., at 575 (footnote omitted). Moreover, *Barr* did not purport to depart from the widely followed common-law rule that only discretionary functions are immune from liability, see W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 1059–1060 (5th ed. 1984).

In the present case, the Court of Appeals, reviewing a summary judgment determination, held that petitioners were not entitled to official immunity solely because they were acting within the scope of their official duties, and that there was a material question whether the challenged conduct was discretionary. 785 F. 2d, at 1553. Applying the foregoing reasoning to this case, it is clear that the court was correct in reversing the District Court's grant of summary judgment. Petitioners have the burden of proving that they are entitled to absolute immunity from the tort suit. Respondent William Erwin asserted that petitioners' "duties only require them to follow established procedures and guidelines," and that they "are not involved in any policy-making work for the United States Government." 1 Record, Doc. No. 4, p. 2. In response, petitioners have not presented any evidence relating to their official duties or to the level of discretion they exercise. Petitioners aver merely that the alleged tortious conduct was "within the scope of their official duties." 1 Record, Exh. A, p. 2. As we stated above, federal officials are not absolutely immune from state-law tort liability for all actions committed within the outer perimeter of their duties. A material issue of fact thus exists as to whether petitioners exercised sufficient discretion in connection with the alleged tort to warrant the shield of absolute immunity.

Because this case comes to us on summary judgment and the relevant factual background is undeveloped, we are not called on to define the precise boundaries of official immunity or to determine the level of discretion required before immunity may attach. In deciding whether particular governmental functions properly fall within the scope of absolute official immunity, however, courts should be careful to heed the Court's admonition in *Doe* to consider whether the contribution to effective government in particular contexts outweighs the potential harm to individual citizens. Courts must not lose sight of the purposes of the official immunity

doctrine when resolving individual claims of immunity or formulating general guidelines. We are also of the view, however, that Congress is in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context. Legislated standards governing the immunity of federal employees involved in state-law tort actions would be useful.

III

The Court of Appeals was correct in holding that absolute immunity does not shield official functions from state-law tort liability unless the challenged conduct is within the outer perimeter of an official's duties and is discretionary in nature. Moreover, absolute immunity does not attach simply because the precise conduct of the federal official is not prescribed by law. There is thus a genuine issue of material fact as to whether petitioners' conduct is entitled to absolute immunity. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

MARINO ET AL. *v.* ORTIZ ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 86-1415. Argued November 30, 1987—Decided January 13, 1988*

The New York City Police Department and groups representing various of its minority officers reached a settlement of the groups' employment discrimination suit under Title VII of the Civil Rights Act of 1964, which settlement was first approved by the District Court on an interim basis and, finally, after a hearing, by consent decree. Although petitioners—a group of white officers claiming to be adversely affected by the settlement—presented their objections at the hearing, they chose not to move to intervene either initially as codefendants or later for purposes of appeal, but instead filed suit during the period between the interim approval of the settlement and the final consent decree, claiming a violation of their Fourteenth Amendment equal protection rights. In the *Marino* case, the Court of Appeals affirmed the District Court's dismissal of petitioners' suit, deeming it an impermissible collateral attack on a consent decree by persons who could have intervened in the underlying litigation. In the *Costello* case, the Court of Appeals dismissed petitioners' attempt to appeal from the consent decree because they were not parties to the litigation giving rise to the decree.

Held:

1. Insofar as the Court of Appeals' *Marino* judgment affirmed the District Court's dismissal of petitioners' suit as an impermissible collateral attack by nonparties, that judgment is affirmed by an equally divided Court.

2. As to the issue raised in *Costello*, the well-settled general rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment prohibits petitioners from appealing from the consent decree approving the settlement of the underlying Title VII action. Despite the Court of Appeals' suggestion that an exception to the general rule may exist when a nonparty has an interest that is affected by the trial court's judgment, the better practice is for the nonparty to seek intervention for purposes of appeal.

806 F. 2d 1144 and 806 F. 2d 1147, affirmed.

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*Together with *Costello et al.* v. *New York City Police Department et al.*, also on certiorari to the same court (see this Court's Rule 19.4).

Ronald Podolsky argued the cause and filed briefs for petitioners.

Glen D. Nager argued the cause *pro hac vice* for the United States as *amicus curiae*. With him on the brief were *Solicitor General Fried, Assistant Attorney General Reynolds, Deputy Solicitor General Ayer, Deputy Assistant Attorney General Clegg, David K. Flynn,* and *Dennis J. Dimsey.*

Leonard J. Koerner argued the cause for respondents and filed a brief for respondent New York City. With him on the brief were *Peter L. Zimroth* and *Elizabeth Dvorkin. Robert David Goodstein* and *Eileen West* filed a brief for respondent Guardians Association of the Police Department of the City of New York, Inc. *Kenneth Kimerling* filed a brief for respondents Hispanic Society et al. *Richard K. Walker* filed a brief for respondent Sergeants Benevolent Association of the City of New York.†

PER CURIAM.

Petitioners seek to challenge a consent decree approving an agreement settling a Title VII lawsuit against the City of New York. After the results of a police sergeant's examination revealed that blacks and Hispanics had passed the examination at disproportionately low rates, groups representing these minority members of the New York City Police Department sued the Department under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42

†*Benjamin Vinar* filed a brief for Dov Hikind et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the city of Birmingham, Alabama, by *James P. Alexander, Robert K. Spotswood,* and *James K. Baker;* for the National League of Cities et al. by *Benna Ruth Solomon, Joyce Holmes Benjamin, Beate Bloch, Barbara E. Etkind, Rebecca L. Ross,* and *Todd D. Peterson;* for the Equal Employment Advisory Council by *Robert E. Williams* and *Douglas S. McDowell;* and for the Lawyers' Committee for Civil Rights Under Law by *Paul C. Saunders, Thomas D. Barr, Robert D. Joffe, Robert F. Mullen, Conrad K. Harper, Stuart J. Land, Norman Redlich, William L. Robinson, Judith A. Winston, Richard T. Seymour,* and *Stephen L. Spitz.*

U. S. C. § 2000e *et seq.* Three other groups were permitted to intervene as codefendants: "the Sergeants Benevolent Association ('SBA'), representing over 500 officers on the eligible list who had obtained provisional appointments as sergeants; the Sergeants Eligibles Association ('SEA'), representing officers who were on the eligible list but had not received provisional appointments; and various white ethnic societies and other individual officers (the 'Schneider Intervenors')." *Hispanic Society of New York City Police Dept.* v. *New York City Police Dept.*, 806 F. 2d 1147, 1151 (CA2 1986) (*Costello* case below). The parties reached settlement, which was first approved by the District Court on an interim basis, and finally, after a hearing, by consent decree. The settlement provided that black and Hispanic candidates who had failed to make the eligible list would be promoted until the racial/ethnic composition of the new sergeants was approximately the same as the racial/ethnic composition of the group of candidates taking the test. The SBA and the SEA signed the agreement; the Schneider Intervenors, although opposing the settlement, chose not to appeal.

Petitioners are a group of white police officers who claim that they were not placed on the eligible list even though they had scored at least as high on the examination as the lowest scoring minority officer promoted under the interim order. Although they presented their objections to the District Court at the hearing, they chose not to move to intervene pursuant to Federal Rule of Civil Procedure 24, either initially as codefendants or later to replace the Schneider Intervenors for purposes of appeal. See *United Airlines, Inc.* v. *McDonald*, 432 U. S. 385, 395 (1977). Instead, they filed suit during the period between the interim approval of the settlement and the final consent decree, claiming a violation of their Fourteenth Amendment equal protection rights. In 806 F. 2d 1144 (CA2 1986) (*Marino* case below), the Court of Appeals affirmed the District Court's dismissal of petitioners' suit, deeming it an impermissible collateral attack on a con-

sent decree by persons who could have intervened in the underlying litigation. Petitioners also attempted to appeal from the consent decree. In *Costello*, the Court of Appeals dismissed the appeal because petitioners were not parties to the litigation giving rise to the consent decree. 806 F. 2d 1147 (CA2 1986). We granted certiorari to consider these judgments, 481 U. S. 1047 (1987).

As to the issue raised in *Marino*, namely, whether a district court may dismiss as an impermissible collateral attack a lawsuit challenging a consent decree by nonparties to the underlying litigation, we are equally divided, and therefore affirm the judgment of the Court of Appeals. As to the issue raised in *Costello*, we hold that because petitioners were not parties to the underlying lawsuit, and because they failed to intervene for purposes of appeal, they may not appeal from the consent decree approving that lawsuit's settlement; therefore, we affirm the judgment of the Court of Appeals. The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled. See, *e. g.*, *United States ex rel. Louisiana* v. *Jack*, 244 U. S. 397, 402 (1917); Fed. Rule App. Proc. 3(c) ("The notice of appeal shall specify the party or parties taking the appeal"). The Court of Appeals suggested that there may be exceptions to this general rule, primarily "when the nonparty has an interest that is affected by the trial court's judgment." 806 F. 2d, at 1152. We think the better practice is for such a nonparty to seek intervention for purposes of appeal; denials of such motions are, of course, appealable. See *United Airlines, Inc.*, *supra*.

Accordingly, the judgments of the Court of Appeals are

Affirmed.

HONIG, CALIFORNIA SUPERINTENDENT OF PUBLIC INSTRUCTION *v.* DOE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 86-728. Argued November 9, 1987—Decided January 20, 1988

In order to assure that States receiving federal financial assistance will provide a "free appropriate public education" for all disabled children, including those with serious emotional disturbances, the Education of the Handicapped Act (EHA or Act) establishes a comprehensive system of procedural safeguards designed to provide meaningful parental participation in all aspects of a child's educational placement, including an opportunity for an impartial due process hearing with respect to any complaints such parents have concerning their child's placement, and the right to seek administrative review of any decisions they think inappropriate. If that review proves unsatisfactory, either the parents or the local educational agency may file a civil action in any state or federal court for "appropriate" relief. 20 U. S. C. § 1415(e)(2). The Act's "stay-put" provision directs that a disabled child "shall remain in [his or her] then current educational placement" pending completion of any review proceedings, unless the parents and state or local educational agencies otherwise agree. § 1415(e)(3). Respondents Doe and Smith, who were emotionally disturbed students, were suspended indefinitely for violent and disruptive conduct related to their disabilities, pending the completion of expulsion proceedings by the San Francisco Unified School District (SFUSD). After unsuccessfully protesting the action against him, Doe filed a suit in Federal District Court, in which Smith intervened, alleging that the suspension and proposed expulsion violated the EHA, and seeking injunctive relief against SFUSD officials and petitioner, the State Superintendent of Public Instruction. The court entered summary judgment for respondents on their EHA claims and issued a permanent injunction. The Court of Appeals affirmed with slight modifications.

Held:

1. The case is moot as to respondent Doe, who is now 24 years old, since the Act limits eligibility to disabled children between the ages of 3 and 21. However, the case is justiciable with respect to respondent Smith, who continues to be eligible for EHA educational services since he is currently only 20 and has not yet completed high school. This Court has jurisdiction since there is a reasonable likelihood that Smith

will again suffer the deprivation of EHA-mandated rights that gave rise to this suit. Given the evidence that he is unable to conform his conduct to socially acceptable norms, and the absence of any suggestion that he has overcome his behavioral problems, it is reasonable to expect that he will again engage in aggressive and disruptive classroom misconduct. Moreover, it is unreasonable to suppose that any future educational placement will so perfectly suit his emotional and academic needs that further disruptions on his part are improbable. If Smith does repeat the objectionable conduct, it is likely that he will again be subjected to the same type of unilateral school action in any California school district in which he is enrolled, in light of the lack of a statewide policy governing local school responses to disability-related misconduct, and petitioner's insistence that all local school districts retain residual authority to exclude disabled children for dangerous conduct. In light of the ponderousness of review procedures under the Act, and the fact that an aggrieved student will often be finished with school or otherwise ineligible for EHA protections by the time review can be had in this Court, the conduct Smith complained of is "capable of repetition, yet evading review." Thus his EHA claims are not moot. Pp. 317–323.

2. The "stay-put" provision prohibits state or local school authorities from unilaterally excluding disabled children from the classroom for dangerous or disruptive conduct growing out of their disabilities during the pendency of review proceedings. Section 1415(e)(3) is unequivocal in its mandate that "the child *shall* remain in the then current educational placement" (emphasis added), and demonstrates a congressional intent to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school. This Court will not rewrite the statute to infer a "dangerousness" exception on the basis of obviousness or congressional inadvertence, since, in drafting the statute, Congress devoted close attention to *Mills* v. *Board of Education of District of Columbia*, 348 F. Supp. 866, and *Pennsylvania Assn. for Retarded Children* v. *Pennsylvania*, 334 F. Supp. 1257, and 343 F. Supp. 279, thereby establishing that the omission of an emergency exception for dangerous students was intentional. However, Congress did not leave school administrators powerless to deal with such students, since implementing regulations allow the use of normal, nonplacement-changing procedures, including temporary suspensions for up to 10 schooldays for students posing an immediate threat to others' safety, while the Act allows for interim placements where parents and school officials are able to agree, and author-

izes officials to file a § 1415(e)(2) suit for "appropriate" injunctive relief where such an agreement cannot be reached. In such a suit, § 1415(e)(3) effectively creates a presumption in favor of the child's current educational placement which school officials can rebut only by showing that maintaining the current placement is substantially likely to result in injury to the student or to others. Here, the District Court properly balanced respondents' interests under the Act against the state and local school officials' safety interest, and both lower courts properly construed and applied § 1415(e)(3), except insofar as the Court of Appeals held that a suspension exceeding 10 schooldays does not constitute a prohibited change in placement. The Court of Appeals' judgment is modified to that extent. Pp. 323–328.

3. Insofar as the Court of Appeals' judgment affirmed the District Court's order directing the State to provide services directly to a disabled child where the local agency has failed to do so, that judgment is affirmed by an equally divided Court. Pp. 328–329.

793 F. 2d 1470, affirmed.

BRENNAN, J., delivered the opinion of the Court as to holdings number 1 and 2 above, in which REHNQUIST, C. J., and WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. REHNQUIST, C. J., filed a concurring opinion, *post*, p. 329. SCALIA, J., filed a dissenting opinion, in which O'CONNOR, J., joined, *post*, p. 332.

Asher Rubin, Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were *John K. Van de Kamp*, Attorney General, *Charlton G. Holland*, Assistant Attorney General, and *John Davidson*, Supervising Deputy Attorney General.

Glen D. Nager argued the cause *pro hac vice* for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Fried, Assistant Attorney General Reynolds, Deputy Solicitor General Ayer, Deputy Assistant Attorney General Carvin, Walter W. Barnett, Dennis J. Dimsey*, and *Wendell L. Willkie*.

Sheila Brogna argued the cause for respondents. With her on the brief were *William J. Taylor* and *Toby Fishbein Rubin*.*

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*Briefs of *amici curiae* urging reversal were filed for the Davis Joint Unified School District et al. by *Charles R. Mack;* for the National School

JUSTICE BRENNAN delivered the opinion of the Court.

As a condition of federal financial assistance, the Education of the Handicapped Act requires States to ensure a "free appropriate public education" for all disabled children within their jurisdictions. In aid of this goal, the Act establishes a comprehensive system of procedural safeguards designed to ensure parental participation in decisions concerning the education of their disabled children and to provide administrative and judicial review of any decisions with which those parents disagree. Among these safeguards is the so-called "stay-put" provision, which directs that a disabled child "shall remain in [his or her] then current educational placement" pending completion of any review proceedings, unless the parents and state or local educational agencies otherwise agree. 20 U. S. C. §1415(e)(3). Today we must decide whether, in the face of this statutory proscription, state or local school authorities may nevertheless unilaterally exclude disabled children from the classroom for dangerous or disruptive conduct growing out of their disabilities. In addition, we are called upon to decide whether a district court may, in the exercise of its equitable powers, order a State to provide educational services directly to a disabled child when the local agency fails to do so.

Boards Association by *Gwendolyn H. Gregory* and *August W. Steinhilber;* for the National School Safety Center et al. by *James A. Rapp, Donna Clontz,* and *Jane Slenkovich;* and for the San Francisco Unified School District by *Louise H. Renne* and *Thomas M. Berliner.*

Briefs of *amici curiae* urging affirmance were filed for the American Association on Mental Deficiency et al. by *Norman S. Rosenberg* and *Janet Stotland;* for the National Association of Protection and Advocacy Systems et al. by *Marilyn Holle;* and for the Center for Law and Education, Inc., et al.

Briefs of *amici curiae* were filed for Senator Chafee et al. by *Arlene Brynne Mayerson;* and for the Legal Aid Society of the City of New York, Juvenile Rights Division, by *Henry S. Weintraub.*

I

In the Education of the Handicapped Act (EHA or the Act), 84 Stat. 175, as amended, 20 U. S. C. § 1400 *et seq.*, Congress sought "to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, [and] to assure that the rights of handicapped children and their parents or guardians are protected." § 1400(c). When the law was passed in 1975, Congress had before it ample evidence that such legislative assurances were sorely needed: 21 years after this Court declared education to be "perhaps the most important function of state and local governments," *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954), congressional studies revealed that better than half of the Nation's 8 million disabled children were not receiving appropriate educational services. § 1400(b)(3). Indeed, one out of every eight of these children was excluded from the public school system altogether, § 1400(b)(4); many others were simply "warehoused" in special classes or were neglectfully shepherded through the system until they were old enough to drop out. See H. R. Rep. No. 94–332, p. 2 (1975). Among the most poorly served of disabled students were emotionally disturbed children: Congressional statistics revealed that for the school year immediately preceding passage of the Act, the educational needs of 82 percent of all children with emotional disabilities went unmet. See S. Rep. No. 94–168, p. 8 (1975) (hereinafter S. Rep.).

Although these educational failings resulted in part from funding constraints, Congress recognized that the problem reflected more than a lack of financial resources at the state and local levels. Two federal-court decisions, which the Senate Report characterized as "landmark," see *id.*, at 6, demonstrated that many disabled children were excluded pursuant to state statutes or local rules and policies, typically without

any consultation with, or even notice to, their parents. See *Mills* v. *Board of Education of District of Columbia*, 348 F. Supp. 866 (DC 1972); *Pennsylvania Assn. for Retarded Children* v. *Pennsylvania*, 334 F. Supp. 1257 (ED Pa. 1971), and 343 F. Supp. 279 (1972) *(PARC)*. Indeed, by the time of the EHA's enactment, parents had brought legal challenges to similar exclusionary practices in 27 other States. See S. Rep., at 6.

In responding to these problems, Congress did not content itself with passage of a simple funding statute. Rather, the EHA confers upon disabled students an enforceable substantive right to public education in participating States, see *Board of Education of Hendrick Hudson Central School Dist.* v. *Rowley*, 458 U. S. 176 (1982),[1] and conditions federal financial assistance upon a State's compliance with the substantive and procedural goals of the Act. Accordingly, States seeking to qualify for federal funds must develop policies assuring all disabled children the "right to a free appropriate public education," and must file with the Secretary of

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[1] Congress' earlier efforts to ensure that disabled students received adequate public education had failed in part because the measures it adopted were largely hortatory. In the 1966 amendments to the Elementary and Secondary Education Act of 1965, Congress established a grant program "for the purpose of assisting the States in the initiation, expansion, and improvement of programs and projects . . . for the education of handicapped children." Pub. L. 89–750, § 161, 80 Stat. 1204. It repealed that program four years later and replaced it with the original version of the Education of the Handicapped Act, Pub. L. 91–230, 84 Stat. 175, Part B of which contained a similar grant program. Neither statute, however, provided specific guidance as to how States were to use the funds, nor did they condition the availability of the grants on compliance with any procedural or substantive safeguards. In amending the EHA to its present form, Congress rejected its earlier policy of "merely establish[ing] an unenforceable goal requiring all children to be in school." 121 Cong. Rec. 37417 (1975) (remarks of Sen. Schweiker). Today, all 50 States and the District of Columbia receive funding assistance under the EHA. U. S. Dept. of Education, Ninth Annual Report to Congress on Implementation of Education of the Handicapped Act (1987).

Education formal plans mapping out in detail the programs, procedures, and timetables under which they will effectuate these policies. 20 U. S. C. §§ 1412(1), 1413(a). Such plans must assure that, "to the maximum extent appropriate," States will "mainstream" disabled children, *i. e.*, that they will educate them with children who are not disabled, and that they will segregate or otherwise remove such children from the regular classroom setting "only when the nature or severity of the handicap is such that education in regular classes . . . cannot be achieved satisfactorily." § 1412(5).

The primary vehicle for implementing these congressional goals is the "individualized educational program" (IEP), which the EHA mandates for each disabled child. Prepared at meetings between a representative of the local school district, the child's teacher, the parents or guardians, and, whenever appropriate, the disabled child, the IEP sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives. § 1401(19). The IEP must be reviewed and, where necessary, revised at least once a year in order to ensure that local agencies tailor the statutorily required "free appropriate public education" to each child's unique needs. § 1414(a)(5).

Envisioning the IEP as the centerpiece of the statute's education delivery system for disabled children, and aware that schools had all too often denied such children appropriate educations without in any way consulting their parents, Congress repeatedly emphasized throughout the Act the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness. See §§ 1400(c), 1401(19), 1412(7), 1415(b)(1)(A), (C), (D), (E), and 1415(b)(2). Accordingly, the Act establishes various procedural safeguards that guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right

to seek review of any decisions they think inappropriate. These safeguards include the right to examine all relevant records pertaining to the identification, evaluation, and educational placement of their child; prior written notice whenever the responsible educational agency proposes (or refuses) to change the child's placement or program; an opportunity to present complaints concerning any aspect of the local agency's provision of a free appropriate public education; and an opportunity for "an impartial due process hearing" with respect to any such complaints. §§ 1415(b)(1), (2).

At the conclusion of any such hearing, both the parents and the local educational agency may seek further administrative review and, where that proves unsatisfactory, may file a civil action in any state or federal court. §§ 1415(c), (e)(2). In addition to reviewing the administrative record, courts are empowered to take additional evidence at the request of either party and to "grant such relief as [they] determine[ ] is appropriate." § 1415(e)(2). The "stay-put" provision at issue in this case governs the placement of a child while these often lengthy review procedures run their course. It directs that:

> "During the pendency of any proceedings conducted pursuant to [§ 1415], unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child . . . ." § 1415(e)(3).

The present dispute grows out of the efforts of certain officials of the San Francisco Unified School District (SFUSD) to expel two emotionally disturbed children from school indefinitely for violent and disruptive conduct related to their disabilities. In November 1980, respondent John Doe assaulted another student at the Louise Lombard School, a developmental center for disabled children. Doe's April 1980 IEP identified him as a socially and physically awkward 17-year-old who experienced considerable difficulty controlling his impulses and anger. Among the goals set out in his IEP was "[i]mprovement in [his] ability to relate to [his]

peers [and to] cope with frustrating situations without resorting to aggressive acts." App. 17. Frustrating situations, however, were an unfortunately prominent feature of Doe's school career: physical abnormalities, speech difficulties, and poor grooming habits had made him the target of teasing and ridicule as early as the first grade, *id.*, at 23; his 1980 IEP reflected his continuing difficulties with peers, noting that his social skills had deteriorated and that he could tolerate only minor frustration before exploding. *Id.*, at 15–16.

On November 6, 1980, Doe responded to the taunts of a fellow student in precisely the explosive manner anticipated by his IEP: he choked the student with sufficient force to leave abrasions on the child's neck, and kicked out a school window while being escorted to the principal's office afterwards. *Id.*, at 208. Doe admitted his misconduct and the school subsequently suspended him for five days. Thereafter, his principal referred the matter to the SFUSD Student Placement Committee (SPC or Committee) with the recommendation that Doe be expelled. On the day the suspension was to end, the SPC notified Doe's mother that it was proposing to exclude her child permanently from SFUSD and was therefore extending his suspension until such time as the expulsion proceedings were completed.[2] The Committee further advised her that she was entitled to attend the November 25 hearing at which it planned to discuss the proposed expulsion.

After unsuccessfully protesting these actions by letter, Doe brought this suit against a host of local school officials

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[2] California law at the time empowered school principals to suspend students for no more than five consecutive schooldays, Cal. Educ. Code Ann. § 48903(a) (West 1978), but permitted school districts seeking to expel a suspended student to "extend the suspension until such time as [expulsion proceedings were completed]; provided, that [it] has determined that the presence of the pupil at the school or in an alternative school placement would cause a danger to persons or property or a threat of disrupting the instructional process." § 48903(h). The State subsequently amended the law to permit school districts to impose longer initial periods of suspension. See n. 3, *infra*.

and the State Superintendent of Public Instruction. Alleging that the suspension and proposed expulsion violated the EHA, he sought a temporary restraining order canceling the SPC hearing and requiring school officials to convene an IEP meeting. The District Judge granted the requested injunctive relief and further ordered defendants to provide home tutoring for Doe on an interim basis; shortly thereafter, she issued a preliminary injunction directing defendants to return Doe to his then current educational placement at Louise Lombard School pending completion of the IEP review process. Doe reentered school on December 15, 5½ weeks, and 24 schooldays, after his initial suspension.

Respondent Jack Smith was identified as an emotionally disturbed child by the time he entered the second grade in 1976. School records prepared that year indicated that he was unable "to control verbal or physical outburst[s]" and exhibited a "[s]evere disturbance in relationships with peers and adults." *Id.*, at 123. Further evaluations subsequently revealed that he had been physically and emotionally abused as an infant and young child and that, despite above average intelligence, he experienced academic and social difficulties as a result of extreme hyperactivity and low self-esteem. *Id.*, at 136, 139, 155, 176. Of particular concern was Smith's propensity for verbal hostility; one evaluator noted that the child reacted to stress by "attempt[ing] to cover his feelings of low self worth through aggressive behavior[,] . . . primarily verbal provocations." *Id.*, at 136.

Based on these evaluations, SFUSD placed Smith in a learning center for emotionally disturbed children. His grandparents, however, believed that his needs would be better served in the public school setting and, in September 1979, the school district acceded to their requests and enrolled him at A. P. Giannini Middle School. His February 1980 IEP recommended placement in a Learning Disability Group, stressing the need for close supervision and a highly structured environment. *Id.*, at 111. Like earlier evalua-

tions, the February 1980 IEP noted that Smith was easily distracted, impulsive, and anxious; it therefore proposed a half-day schedule and suggested that the placement be undertaken on a trial basis. *Id.*, at 112, 115.

At the beginning of the next school year, Smith was assigned to a full-day program; almost immediately thereafter he began misbehaving. School officials met twice with his grandparents in October 1980 to discuss returning him to a half-day program; although the grandparents agreed to the reduction, they apparently were never apprised of their right to challenge the decision through EHA procedures. The school officials also warned them that if the child continued his disruptive behavior—which included stealing, extorting money from fellow students, and making sexual comments to female classmates—they would seek to expel him. On November 14, they made good on this threat, suspending Smith for five days after he made further lewd comments. His principal referred the matter to the SPC, which recommended exclusion from SFUSD. As it did in John Doe's case, the Committee scheduled a hearing and extended the suspension indefinitely pending a final disposition in the matter. On November 28, Smith's counsel protested these actions on grounds essentially identical to those raised by Doe, and the SPC agreed to cancel the hearing and to return Smith to a half-day program at A. P. Giannini or to provide home tutoring. Smith's grandparents chose the latter option and the school began home instruction on December 10; on January 6, 1981, an IEP team convened to discuss alternative placements.

After learning of Doe's action, Smith sought and obtained leave to intervene in the suit. The District Court subsequently entered summary judgment in favor of respondents on their EHA claims and issued a permanent injunction. In a series of decisions, the District Judge found that the proposed expulsions and indefinite suspensions of respondents for conduct attributable to their disabilities deprived

them of their congressionally mandated right to a free appropriate public education, as well as their right to have that education provided in accordance with the procedures set out in the EHA. The District Judge therefore permanently enjoined the school district from taking any disciplinary action other than a 2- or 5-day suspension against any disabled child for disability-related misconduct, or from effecting any other change in the educational placement of any such child without parental consent pending completion of any EHA proceedings. In addition, the judge barred the State from authorizing unilateral placement changes and directed it to establish an EHA compliance-monitoring system or, alternatively, to enact guidelines governing local school responses to disability-related misconduct. Finally, the judge ordered the State to provide services directly to disabled children when, in any individual case, the State determined that the local educational agency was unable or unwilling to do so.

On appeal, the Court of Appeals for the Ninth Circuit affirmed the orders with slight modifications. *Doe* v. *Maher*, 793 F. 2d 1470 (1986). Agreeing with the District Court that an indefinite suspension in aid of expulsion constitutes a prohibited "change in placement" under § 1415(e)(3), the Court of Appeals held that the stay-put provision admitted of no "dangerousness" exception and that the statute therefore rendered invalid those provisions of the California Education Code permitting the indefinite suspension or expulsion of disabled children for misconduct arising out of their disabilities. The court concluded, however, that fixed suspensions of up to 30 schooldays did not fall within the reach of § 1415(e)(3), and therefore upheld recent amendments to the state Education Code authorizing such suspensions.[3] Lastly, the court

[3] In 1983, the State amended its Education Code to permit school districts to impose initial suspensions of 20, and in certain circumstances, 30 schooldays. Cal. Educ. Code Ann. §§ 48912(a), 48903 (West Supp. 1988). The legislature did not alter the indefinite suspension authority which the

affirmed that portion of the injunction requiring the State to provide services directly to a disabled child when the local educational agency fails to do so.

Petitioner Bill Honig, California Superintendent of Public Instruction,[4] sought review in this Court, claiming that the Court of Appeals' construction of the stay-put provision conflicted with that of several other Courts of Appeals which had recognized a dangerousness exception, compare *Doe* v. *Maher*, *supra* (case below), with *Jackson* v. *Franklin County School Board*, 765 F. 2d 535, 538 (CA5 1985); *Victoria L.* v. *District School Bd. of Lee County, Fla.*, 741 F. 2d 369, 374 (CA11 1984); *S–1* v. *Turlington*, 635 F. 2d 342, 348, n. 9 (CA5), cert. denied, 454 U. S. 1030 (1981), and that the direct services ruling placed an intolerable burden on the State. We granted certiorari to resolve these questions, 479 U. S. 1084 (1987), and now affirm.

II

At the outset, we address the suggestion, raised for the first time during oral argument, that this case is moot.[5] Under Article III of the Constitution this Court may only adjudicate actual, ongoing controversies. *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 546 (1976); *Preiser* v. *Newkirk*, 422 U. S. 395, 401 (1975). That the dispute between the parties was very much alive when suit was filed, or at the time the Court of Appeals rendered its judgment, cannot substitute for the actual case or controversy that an exercise of this Court's jurisdiction requires. *Steffel* v. *Thompson*,

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SPC exercised in this case, but simply incorporated the earlier provision into a new section. See § 48911(g).

[4] At the time respondent Doe initiated this suit, Wilson Riles was the California Superintendent of Public Instruction. Petitioner Honig succeeded him in office.

[5] We note that both petitioner and respondents believe that this case presents a live controversy. See Tr. of Oral Arg. 6, 27–31. Only the United States, appearing as *amicus curiae*, urges that the case is presently nonjusticiable. *Id.*, at 21.

415 U. S. 452, 459, n. 10 (1974); *Roe* v. *Wade*, 410 U. S. 113, 125 (1973). In the present case, we have jurisdiction if there is a reasonable likelihood that respondents will again suffer the deprivation of EHA-mandated rights that gave rise to this suit. We believe that, at least with respect to respondent Smith, such a possibility does in fact exist and that the case therefore remains justiciable.

Respondent John Doe is now 24 years old and, accordingly, is no longer entitled to the protections and benefits of the EHA, which limits eligibility to disabled children between the ages of 3 and 21. See 20 U. S. C. § 1412(2)(B). It is clear, therefore, that whatever rights to state educational services he may yet have as a ward of the State, see Tr. of Oral Arg. 23, 26, the Act would not govern the State's provision of those services, and thus the case is moot as to him. Respondent Jack Smith, however, is currently 20 and has not yet completed high school. Although at present he is not faced with any proposed expulsion or suspension proceedings, and indeed no longer even resides within the SFUSD, he remains a resident of California and is entitled to a "free appropriate public education" within that State. His claims under the EHA, therefore, are not moot if the conduct he originally complained of is "'capable of repetition, yet evading review.'" *Murphy* v. *Hunt*, 455 U. S. 478, 482 (1982). Given Smith's continued eligibility for educational services under the EHA,[6] the nature of his disability, and petitioner's

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[6] Notwithstanding respondent's undisputed right to a free appropriate public education in California, JUSTICE SCALIA argues in dissent that there is no "demonstrated probability" that Smith will actually avail himself of that right because his counsel was unable to state affirmatively during oral argument that her client would seek to reenter the state school system. See *post*, at 337. We believe the dissent overstates the stringency of the "capable of repetition" test. Although JUSTICE SCALIA equates "reasonable expectation" with "demonstrated probability," the very case he cites for this proposition described these standards in the disjunctive, see *Murphy* v. *Hunt*, 455 U. S., at 482 ("[T]here must be a 'reasonable expectation' *or* a 'demonstrated probability' that the same controversy will

insistence that all local school districts retain residual authority to exclude disabled children for dangerous conduct, we have little difficulty concluding that there is a "reasonable

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recur" (emphasis added)), and in numerous cases decided both before and since *Hunt* we have found controversies capable of repetition based on expectations that, while reasonable, were hardly demonstrably probable. See, *e. g.*, *Burlington Northern R. Co.* v. *Maintenance of Way Employes*, 481 U. S. 429, 436, n. 4 (1987) (parties "reasonably likely" to find themselves in future disputes over collective-bargaining agreement); *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U. S. 572, 578 (1987) (O'CONNOR, J.) ("likely" that respondent would again submit mining plans that would trigger contested state permit requirement); *Press-Enterprise Co.* v. *Superior Court of Cal., Riverside County*, 478 U. S. 1, 6 (1986) ("It can reasonably be assumed" that newspaper publisher will be subjected to similar closure order in the future); *Globe Newspaper Co.* v. *Superior Court of Norfolk County*, 457 U. S. 596, 603 (1982) (same); *United States Parole Comm'n* v. *Geraghty*, 445 U. S. 388, 398 (1980) (case not moot where litigant "faces some likelihood of becoming involved in same controversy in the future") (dicta). Our concern in these cases, as in all others involving potentially moot claims, was whether the controversy was *capable* of repetition and not, as the dissent seems to insist, whether the claimant had demonstrated that a recurrence of the dispute was more probable than not. Regardless, then, of whether respondent has established with mathematical precision the likelihood that he will enroll in public school during the next two years, we think there is at the very least a reasonable expectation that he will exercise his rights under the EHA. In this regard, we believe respondent's actions over the course of the last seven years speak louder than his counsel's momentary equivocation during oral argument. Since 1980, he has sought to vindicate his right to an appropriate public education that is not only free of charge, but also free from the threat that school officials will unilaterally change his placement or exclude him from class altogether. As a disabled young man, he has as at least as great a need of a high school education and diploma as any of his peers, and his counsel advises us that he is awaiting the outcome of this case to decide whether to pursue his degree. Tr. Oral Arg. 23–24. Under these circumstances, we think it not only counterintuitive but also unreasonable to assume that respondent will forgo the exercise of a right that he has for so long sought to defend. Certainly we have as much reason to expect that respondent will reenter the California school system as we had to assume that Jane Roe would again both have an unwanted pregnancy and wish to exercise her right to an abortion. See *Roe* v. *Wade*, 410 U. S. 113, 125 (1973).

expectation," *ibid.*, that Smith would once again be subjected to a unilateral "change in placement" for conduct growing out of his disabilities were it not for the statewide injunctive relief issued below.

Our cases reveal that, for purposes of assessing the likelihood that state authorities will reinflict a given injury, we generally have been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury. See *Los Angeles* v. *Lyons*, 461 U. S. 95, 105–106 (1983) (no threat that party seeking injunction barring police use of chokeholds would be stopped again for traffic violation or other offense, or would resist arrest if stopped); *Murphy* v. *Hunt*, *supra*, at 484 (no reason to believe that party challenging denial of pretrial bail "will once again be in a position to demand bail"); *O'Shea* v. *Littleton*, 414 U. S. 488, 497 (1974) (unlikely that parties challenging discriminatory bond-setting, sentencing, and jury-fee practices would again violate valid criminal laws). No such reluctance, however, is warranted here. It is respondent Smith's very inability to conform his conduct to socially acceptable norms that renders him "handicapped" within the meaning of the EHA. See 20 U. S. C. § 1401(1); 34 CFR § 300.5(b)(8) (1987). As noted above, the record is replete with evidence that Smith is unable to govern his aggressive, impulsive behavior—indeed, his notice of suspension acknowledged that "Jack's actions seem beyond his control." App. 152. In the absence of any suggestion that respondent has overcome his earlier difficulties, it is certainly reasonable to expect, based on his prior history of behavioral problems, that he will again engage in classroom misconduct. Nor is it reasonable to suppose that Smith's future educational placement will so perfectly suit his emotional and academic needs that further disruptions on his part are improbable. Although JUSTICE SCALIA suggests in his dissent, *post*, at 338, that school officials are unlikely to place Smith in a setting where they cannot control his misbehavior, any ef-

forts to ensure such total control must be tempered by the school system's statutory obligations to provide respondent with a free appropriate public education in "the least restrictive environment," 34 CFR §300.552(d) (1987); to educate him, "to the maximum extent appropriate," with children who are not disabled, 20 U. S. C. §1412(5); and to consult with his parents or guardians, and presumably with respondent himself, before choosing a placement. §§1401(19), 1415 (b). Indeed, it is only by ignoring these mandates, as well as Congress' unquestioned desire to wrest from school officials their former unilateral authority to determine the placement of emotionally disturbed children, see *infra*, at 323–324, that the dissent can so readily assume that respondent's future placement will satisfactorily prevent any further dangerous conduct on his part. Overarching these statutory obligations, moreover, is the inescapable fact that the preparation of an IEP, like any other effort at predicting human behavior, is an inexact science at best. Given the unique circumstances and context of this case, therefore, we think it reasonable to expect that respondent will again engage in the type of misconduct that precipitated this suit.

We think it equally probable that, should he do so, respondent will again be subjected to the same unilateral school action for which he initially sought relief. In this regard, it matters not that Smith no longer resides within the SFUSD. While the actions of SFUSD officials first gave rise to this litigation, the District Judge expressly found that the lack of a state policy governing local school responses to disability-related misconduct had led to, and would continue to result in, EHA violations, and she therefore enjoined the state defendant from authorizing, among other things, unilateral placement changes. App. 247–248. She of course also issued injunctions directed at the local defendants, but they did not seek review of those orders in this Court. Only petitioner, the State Superintendent of Public Instruction, has invoked our jurisdiction, and he now urges us to hold that

local school districts retain unilateral authority under the EHA to suspend or otherwise remove disabled children for dangerous conduct. Given these representations, we have every reason to believe that were it not for the injunction barring petitioner from authorizing such unilateral action, respondent would be faced with a real and substantial threat of such action in any California school district in which he enrolled. Cf. *Los Angeles* v. *Lyons*, *supra*, at 106 (respondent lacked standing to seek injunctive relief because he could not plausibly allege that police officers choked all persons whom they stopped, or that the city "*authorized* police officers to act in such manner" (emphasis added)). Certainly, if the SFUSD's past practice of unilateral exclusions was at odds with state policy and the practice of local school districts generally, petitioner would not now stand before us seeking to defend the right of all local school districts to engage in such aberrant behavior.[7]

We have previously noted that administrative and judicial review under the EHA is often "ponderous," *Burlington School Committee* v. *Massachusetts Dept. of Education*, 471 U. S. 359, 370 (1985), and this case, which has taken seven years to reach us, amply confirms that observation. For obvious reasons, the misconduct of an emotionally disturbed or otherwise disabled child who has not yet reached adolescence typically will not pose such a serious threat to the well-being of other students that school officials can only ensure classroom safety by excluding the child. Yet, the adolescent student improperly disciplined for misconduct that does pose such a threat will often be finished with school or otherwise

[7] Petitioner concedes that the school district "made a number of procedural mistakes in its eagerness to protect other students from Doe and Smith." Reply Brief for Petitioner 6. According to petitioner, however, unilaterally excluding respondents from school was not among them; indeed, petitioner insists that the SFUSD acted properly in removing respondents and urges that the stay-put provision "should not be interpreted to require a school district to maintain such dangerous children with other children." *Id.*, at 6–7.

ineligible for EHA protections by the time review can be had in this Court. Because we believe that respondent Smith has demonstrated both "a sufficient likelihood that he will again be wronged in a similar way," *Los Angeles* v. *Lyons*, 461 U. S., at 111, and that any resulting claim he may have for relief will surely evade our review, we turn to the merits of his case.

III

The language of § 1415(e)(3) is unequivocal. It states plainly that during the pendency of any proceedings initiated under the Act, unless the state or local educational agency and the parents or guardian of a disabled child otherwise agree, "the child *shall* remain in the then current educational placement." § 1415(e)(3) (emphasis added). Faced with this clear directive, petitioner asks us to read a "dangerousness" exception into the stay-put provision on the basis of either of two essentially inconsistent assumptions: first, that Congress thought the residual authority of school officials to exclude dangerous students from the classroom too obvious for comment; or second, that Congress inadvertently failed to provide such authority and this Court must therefore remedy the oversight. Because we cannot accept either premise, we decline petitioner's invitation to rewrite the statute.

Petitioner's arguments proceed, he suggests, from a simple, commonsense proposition: Congress could not have intended the stay-put provision to be read literally, for such a construction leads to the clearly unintended, and untenable, result that school districts must return violent or dangerous students to school while the often lengthy EHA proceedings run their course. We think it clear, however, that Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school. In so doing, Congress did not leave school administrators powerless to deal with dangerous students; it did, however, deny school officials their former right to "self-help," and directed

that in the future the removal of disabled students could be accomplished only with the permission of the parents or, as a last resort, the courts.

As noted above, Congress passed the EHA after finding that school systems across the country had excluded one out of every eight disabled children from classes. In drafting the law, Congress was largely guided by the recent decisions in *Mills* v. *Board of Education of District of Columbia*, 348 F. Supp. 866 (1972), and *PARC*, 343 F. Supp. 279 (1972), both of which involved the exclusion of hard-to-handle disabled students. *Mills* in particular demonstrated the extent to which schools used disciplinary measures to bar children from the classroom. There, school officials had labeled four of the seven minor plaintiffs "behavioral problems," and had excluded them from classes without providing any alternative education to them or any notice to their parents. 348 F. Supp., at 869–870. After finding that this practice was not limited to the named plaintiffs but affected in one way or another an estimated class of 12,000 to 18,000 disabled students, *id.*, at 868–869, 875, the District Court enjoined future exclusions, suspensions, or expulsions "on grounds of discipline." *Id.*, at 880.

Congress attacked such exclusionary practices in a variety of ways. It required participating States to educate *all* disabled children, regardless of the severity of their disabilities, 20 U. S. C. § 1412(2)(C), and included within the definition of "handicapped" those children with serious emotional disturbances. § 1401(1). It further provided for meaningful parental participation in all aspects of a child's educational placement, and barred schools, through the stay-put provision, from changing that placement over the parent's objection until all review proceedings were completed. Recognizing that those proceedings might prove long and tedious, the Act's drafters did not intend § 1415(e)(3) to operate inflexibly, see 121 Cong. Rec. 37412 (1975) (remarks of Sen. Stafford), and they therefore allowed for interim placements where par-

ents and school officials are able to agree on one. Conspicuously absent from § 1415(e)(3), however, is any emergency exception for dangerous students. This absence is all the more telling in light of the injunctive decree issued in *PARC*, which permitted school officials unilaterally to remove students in "'extraordinary circumstances.'" 343 F. Supp., at 301. Given the lack of any similar exception in *Mills*, and the close attention Congress devoted to these "landmark" decisions, see S. Rep., at 6, we can only conclude that the omission was intentional; we are therefore not at liberty to engraft onto the statute an exception Congress chose not to create.

Our conclusion that § 1415(e)(3) means what it says does not leave educators hamstrung. The Department of Education has observed that, "[w]hile the [child's] placement may not be changed [during any complaint proceeding], this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others." Comment following 34 CFR § 300.513 (1987). Such procedures may include the use of study carrels, timeouts, detention, or the restriction of privileges. More drastically, where a student poses an immediate threat to the safety of others, officials may temporarily suspend him or her for up to 10 schooldays.[8] This authority, which respondent

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[8] The Department of Education has adopted the position first espoused in 1980 by its Office of Civil Rights that a suspension of up to 10 schooldays does not amount to a "change in placement" prohibited by § 1415(e)(3). U. S. Dept. of Education, Office of Special Education Programs, Policy Letter (Feb. 26, 1987), Ed. for Handicapped L. Rep. 211:437 (1987). The EHA nowhere defines the phrase "change in placement," nor does the statute's structure or legislative history provide any guidance as to how the term applies to fixed suspensions. Given this ambiguity, we defer to the construction adopted by the agency charged with monitoring and enforcing the statute. See *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 448 (1987). Moreover, the agency's position comports fully with the purposes of the statute: Congress sought to prevent schools from permanently and unilaterally excluding disabled children by means of indefinite suspensions and

in no way disputes, not only ensures that school administrators can protect the safety of others by promptly removing the most dangerous of students, it also provides a "cooling down" period during which officials can initiate IEP review and seek to persuade the child's parents to agree to an interim placement. And in those cases in which the parents of a truly dangerous child adamantly refuse to permit any change in placement, the 10-day respite gives school officials an opportunity to invoke the aid of the courts under § 1415(e)(2), which empowers courts to grant any appropriate relief.

Petitioner contends, however, that the availability of judicial relief is more illusory than real, because a party seeking review under § 1415(e)(2) must exhaust time-consuming administrative remedies, and because under the Court of Appeals' construction of § 1415(e)(3), courts are as bound by the stay-put provision's "automatic injunction," 793 F. 2d, at 1486, as are schools.[9] It is true that judicial review is nor-

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expulsions; the power to impose fixed suspensions of short duration does not carry the potential for total exclusion that Congress found so objectionable. Indeed, despite its broad injunction, the District Court in *Mills* v. *Board of Education of District of Columbia*, 348 F. Supp. 866 (DC 1972), recognized that school officials could suspend disabled children on a short-term, temporary basis. See *id*, at 880. Cf. *Goss* v. *Lopez*, 419 U. S. 565, 574–576 (1975) (suspension of 10 schooldays or more works a sufficient deprivation of property and liberty interests to trigger the protections of the Due Process Clause). Because we believe the agency correctly determined that a suspension in excess of 10 days does constitute a prohibited "change in placement," we conclude that the Court of Appeals erred to the extent it approved suspensions of 20 and 30 days' duration.

[9] Petitioner also notes that in California, schools may not suspend any given student for more than a total of 20, and in certain special circumstances 30, schooldays in a single year, see Cal. Educ. Code Ann. § 48903 (West Supp. 1988); he argues, therefore, that a school district may not have the option of imposing a 10-day suspension when dealing with an obstreperous child whose previous suspensions for the year total 18 or 19 days. The fact remains, however, that state law does not define the scope of § 1415(e)(3). There may be cases in which a suspension that is otherwise valid under the stay-put provision would violate local law. The effect

mally not available under § 1415(e)(2) until all administrative proceedings are completed, but as we have previously noted, parents may bypass the administrative process where exhaustion would be futile or inadequate. See *Smith* v. *Robinson*, 468 U. S. 992, 1014, n. 17 (1984) (citing cases); see also 121 Cong. Rec. 37416 (1975) (remarks of Sen. Williams) ("[E]xhaustion . . . should not be required . . . in cases where such exhaustion would be futile either as a legal or practical matter"). While many of the EHA's procedural safeguards protect the rights of parents and children, schools can and do seek redress through the administrative review process, and we have no reason to believe that Congress meant to require schools alone to exhaust in all cases, no matter how exigent the circumstances. The burden in such cases, of course, rests with the school to demonstrate the futility or inadequacy of administrative review, but nothing in § 1415(e)(2) suggests that schools are completely barred from attempting to make such a showing. Nor do we think that § 1415(e)(3) operates to limit the equitable powers of district courts such that they cannot, in appropriate cases, temporarily enjoin a dangerous disabled child from attending school. As the EHA's legislative history makes clear, one of the evils Congress sought to remedy was the unilateral exclusion of disabled children by *schools*, not courts, and one of the purposes of § 1415(e)(3), therefore, was "to prevent *school* officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings." *Burlington School Committee* v. *Massachusetts Dept. of Education*, 471 U. S., at 373 (emphasis added). The stay-put provision in no way purports to limit or pre-empt the authority conferred on courts by § 1415(e)(2), see *Doe* v. *Brookline School Committee*, 722 F. 2d 910, 917 (CA1 1983); indeed, it says nothing whatever about judicial power.

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of such a violation, however, is a question of state law upon which we express no view.

In short, then, we believe that school officials are entitled to seek injunctive relief under § 1415(e)(2) in appropriate cases. In any such action, § 1415(e)(3) effectively creates a presumption in favor of the child's current educational placement which school officials can overcome only by showing that maintaining the child in his or her current placement is substantially likely to result in injury either to himself or herself, or to others. In the present case, we are satisfied that the District Court, in enjoining the state and local defendants from indefinitely suspending respondent or otherwise unilaterally altering his then current placement, properly balanced respondent's interest in receiving a free appropriate public education in accordance with the procedures and requirements of the EHA against the interests of the state and local school officials in maintaining a safe learning environment for all their students.[10]

IV

We believe the courts below properly construed and applied § 1415(e)(3), except insofar as the Court of Appeals held that a suspension in excess of 10 schooldays does not consti-

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[10] We therefore reject the United States' contention that the District Judge abused her discretion in enjoining the local school officials from indefinitely suspending respondent pending completion of the expulsion proceedings. Contrary to the Government's suggestion, the District Judge did not view herself bound to enjoin any and all violations of the stay-put provision, but rather, consistent with the analysis we set out above, weighed the relative harms to the parties and found that the balance tipped decidedly in favor of respondent. App. 222–223. We of course do not sit to review the factual determinations underlying that conclusion. We do note, however, that in balancing the parties' respective interests, the District Judge gave proper consideration to respondent's rights under the EHA. While the Government complains that the District Court indulged an improper presumption of irreparable harm to respondent, we do not believe that school officials can escape the presumptive effect of the stay-put provision simply by violating it and forcing parents to petition for relief. In any suit brought by parents seeking injunctive relief for a violation of § 1415(e)(3), the burden rests with the school district to demonstrate that the educational status quo must be altered.

tute a "change in placement."[11] We therefore affirm the Court of Appeals' judgment on this issue as modified herein. Because we are equally divided on the question whether a court may order a State to provide services directly to a disabled child where the local agency has failed to do so, we affirm the Court of Appeals' judgment on this issue as well.

Affirmed.

CHIEF JUSTICE REHNQUIST, concurring.

I write separately on the mootness issue in this case to explain why I have joined Part II of the Court's opinion, and why I think reconsideration of our mootness jurisprudence may be in order when dealing with cases decided by this Court.

The present rule in federal cases is that an actual controversy must exist at all stages of appellate review, not merely at the time the complaint is filed. This doctrine was clearly articulated in *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950), in which Justice Douglas noted that "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *Id.*, at 39. The rule has been followed fairly consistently over the last 30 years. See, *e. g.*, *Preiser* v. *Newkirk*, 422 U. S. 395 (1975); *SEC* v. *Medical Committee for Human Rights*, 404 U. S. 403 (1972).

All agree that this case was "very much alive," *ante*, at 317, when the action was filed in the District Court, and very probably when the Court of Appeals decided the case. It is supervening events since the decision of the Court of Appeals which have caused the dispute between the majority and the dissent over whether this case is moot. Therefore, all that the Court actually *holds* is that these supervening events do

[11] See n. 8, *supra*.

not deprive *this* Court of the authority to hear the case. I agree with that holding, and would go still further in the direction of relaxing the test of mootness where the events giving rise to the claim of mootness have occurred after our decision to grant certiorari or to note probable jurisdiction.

The Court implies in its opinion, and the dissent expressly states, that the mootness doctrine is based upon Art. III of the Constitution. There is no doubt that our recent cases have taken that position. See *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 546 (1976); *Preiser* v. *Newkirk*, *supra*, at 401; *Sibron* v. *New York*, 392 U. S. 40, 57 (1968); *Liner* v. *Jafco, Inc.*, 375 U. S. 301, 306, n. 3 (1964). But it seems very doubtful that the earliest case I have found discussing mootness, *Mills* v. *Green*, 159 U. S. 651 (1895), was premised on constitutional constraints; Justice Gray's opinion in that case nowhere mentions Art. III.

If it were indeed Art. III which—by reason of its requirement of a case or controversy for the exercise of federal judicial power—underlies the mootness doctrine, the "capable of repetition, yet evading review" exception relied upon by the Court in this case would be incomprehensible. Article III extends the judicial power of the United States only to cases and controversies; it does not except from this requirement other lawsuits which are "capable of repetition, yet evading review." If our mootness doctrine were forced upon us by the case or controversy requirement of Art. III itself, we would have no more power to decide lawsuits which are "moot" but which also raise questions which are capable of repetition but evading review than we would to decide cases which are "moot" but raise no such questions.

The exception to mootness for cases which are "capable of repetition, yet evading review," was first stated by this Court in *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498 (1911). There the Court enunciated the exception in the light of obvious pragmatic considerations, with no mention of Art. III as the principle underlying the mootness doctrine:

> "The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress." *Id.*, at 515.

The exception was explained again in *Moore* v. *Ogilvie*, 394 U. S. 814, 816 (1969):

> "The problem is therefore 'capable of repetition, yet evading review.' The need for its resolution thus reflects a continuing controversy in the federal-state area where our 'one man, one vote' decisions have thrust" (citation omitted).

It is also worth noting that *Moore* v. *Ogilvie* involved a question which had been mooted by an election, just as did *Mills* v. *Green* some 74 years earlier. But at the time of *Mills*, the case originally enunciating the mootness doctrine, there was no thought of any exception for cases which were "capable of repetition, yet evading review."

The logical conclusion to be drawn from these cases, and from the historical development of the principle of mootness, is that while an unwillingness to decide moot cases may be connected to the case or controversy requirement of Art. III, it is an attenuated connection that may be overridden where there are strong reasons to override it. The "capable of repetition, yet evading review" exception is an example. So too is our refusal to dismiss as moot those cases in which the defendant voluntarily ceases, at some advanced stage of the appellate proceedings, whatever activity prompted the plaintiff to seek an injunction. See, *e. g.*, *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U. S. 283, 289, n. 10 (1982); *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632 (1953). I believe that we should adopt an additional exception to our

present mootness doctrine for those cases where the events which render the case moot have supervened since our grant of certiorari or noting of probable jurisdiction in the case. Dissents from denial of certiorari in this Court illustrate the proposition that the roughly 150 or 160 cases which we decide each year on the merits are less than the number of cases warranting review by us if we are to remain, as Chief Justice Taft said many years ago, "the last word on every important issue under the Constitution and the statutes of the United States." But these unique resources—the time spent preparing to decide the case by reading briefs, hearing oral argument, and conferring—are squandered in every case in which it becomes apparent after the decisional process is underway that we may not reach the question presented. To me the unique and valuable ability of this Court to decide a case—we are, at present, the only Art. III court which can decide a federal question in such a way as to bind all other courts—is a sufficient reason either to abandon the doctrine of mootness altogether in cases which this Court has decided to review, or at least to relax the doctrine of mootness in such a manner as the dissent accuses the majority of doing here. I would leave the mootness doctrine as established by our cases in full force and effect when applied to the earlier stages of a lawsuit, but I believe that once this Court has undertaken a consideration of a case, an exception to that principle is just as much warranted as where a case is "capable of repetition, yet evading review."

JUSTICE SCALIA, with whom JUSTICE O'CONNOR joins, dissenting.

Without expressing any views on the merits of this case, I respectfully dissent because in my opinion we have no authority to decide it. I think the controversy is moot.

I

The Court correctly acknowledges that we have no power under Art. III of the Constitution to adjudicate a case that no

longer presents an actual, ongoing dispute between the named parties. *Ante*, at 317, citing *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 546 (1976); *Preiser* v. *Newkirk*, 422 U. S. 395, 401 (1975). Here, there is obviously no present controversy between the parties, since both respondents are no longer in school and therefore no longer subject to a unilateral "change in placement." The Court concedes mootness with respect to respondent John Doe, who is now too old to receive the benefits of the Education of the Handicapped Act (EHA). *Ante*, at 318. It concludes, however, that the case is not moot as to respondent Jack Smith, who has two more years of eligibility but is no longer in the public schools, because the controversy is "capable of repetition, yet evading review." *Ante*, at 318–323.

Jurisdiction on the basis that a dispute is "capable of repetition, yet evading review" is limited to the "exceptional situatio[n]," *Los Angeles* v. *Lyons*, 461 U. S. 95, 109 (1983), where the following two circumstances simultaneously occur: "'(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.'" *Murphy* v. *Hunt*, 455 U. S. 478, 482 (1982) *(per curiam)*, quoting *Weinstein* v. *Bradford*, 423 U. S. 147, 149 (1975) *(per curiam)*. The second of these requirements is not met in this case.

For there to be a "reasonable expectation" that Smith will be subjected to the same action again, that event must be a "demonstrated probability." *Murphy* v. *Hunt*, *supra*, at 482, 483; *Weinstein* v. *Bradford*, *supra*, at 149. I am surprised by the Court's contention, fraught with potential for future mischief, that "reasonable expectation" is satisfied by something less than "demonstrated probability." *Ante*, at 318–319, n. 6. No one expects that to happen which he does not think probable; and his expectation cannot be shown to be reasonable unless the probability is demonstrated. Thus, as the Court notes, our cases recite the two descriptions side by

side ("a 'reasonable expectation' or a 'demonstrated probability,'" *Hunt*, *supra*, at 482). The Court asserts, however, that these standards are "described . . . in the disjunctive," *ante*, at 318–319, n. 6—evidently believing that the conjunction "or" has no accepted usage except a disjunctive one, *i. e.*, "expressing an alternative, contrast, or opposition," Webster's Third New International Dictionary 651 (1981). In fact, however, the conjunction is often used "to indicate . . . (3) the synonymous, equivalent, or substitutive character of two words or phrases ⟨fell over a precipice [or] cliff⟩ ⟨the off [or] far side⟩ ⟨lessen [or] abate⟩; (4) correction or greater exactness of phrasing or meaning ⟨these essays, [or] rather rough sketches⟩ ⟨the present king had no children—[or] no legitimate children . . .⟩." *Id.*, at 1585. It is obvious that in saying "a reasonable expectation or a demonstrated probability" we have used the conjunction in one of the latter, or nondisjunctive, senses. Otherwise (and according to the Court's exegesis), we would have been saying that a controversy is sufficiently likely to recur if *either* a certain degree of probability exists *or* a higher degree of probability exists. That is rather like a statute giving the vote to persons who are "18 or 21." A bare six years ago, the author of today's opinion and one other Member of the majority plainly understood "reasonable expectation" and "demonstrated probability" to be synonymous. Cf. *Edgar* v. *MITE Corp.*, 457 U. S. 624, 662, and n. 11 (1982) (MARSHALL, J., dissenting, joined by BRENNAN, J.) (using the two terms here at issue interchangeably, and concluding that the case is moot because "there is no *demonstrated probability* that the State will have occasion to prevent MITE from making a takeover offer for some other corporation") (emphasis added).

The prior holdings cited by the Court in a footnote, see *ante*, at 319, n. 6, offer no support for the novel proposition that less than a probability of recurrence is sufficient to avoid mootness. In *Burlington Northern R. Co.* v. *Maintenance of Way Employes*, 481 U. S. 429, 436, n. 4 (1987), we found

that the same railroad and union were "reasonably likely" to find themselves in a recurring dispute over the same issue. Similarly, in *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U. S. 572, 578 (1987), we found it "likely" that the plaintiff mining company would submit new plans which the State would seek to subject to its coastal permit requirements. See Webster's Third New International Dictionary 1310 (1981) (defining "likely" as "of such a nature or so circumstanced as to make something probable[;] . . . seeming to justify belief or expectation[;] . . . in all probability"). In the cases involving exclusion orders issued to prevent the press from attending criminal trials, we found that "[i]t can reasonably be assumed" that a news organization covering the area in which the defendant court sat will again be subjected to that court's closure rules. *Press-Enterprise Co.* v. *Superior Court of Cal., Riverside County*, 478 U. S. 1, 6 (1986); *Globe Newspaper Co.* v. *Superior Court of Norfolk County*, 457 U. S. 596, 603 (1982). In these and other cases, one may quarrel, perhaps, with the accuracy of the Court's probability assessment; but there is no doubt that assessment was regarded as necessary to establish jurisdiction.

In *Roe* v. *Wade*, 410 U. S. 113, 125 (1973), we found that the "human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete," so that "pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied." *Roe*, at least one other abortion case, see *Doe* v. *Bolton*, 410 U. S. 179, 187 (1973), and some of our election law decisions, see *Rosario* v. *Rockefeller*, 410 U. S. 752, 756, n. 5 (1973); *Dunn* v. *Blumstein*, 405 U. S. 330, 333, n. 2 (1972), differ from the body of our mootness jurisprudence *not* in accepting less than a probability that the issue will recur, in a manner evading review, between the same parties; but in dispensing with the same-party requirement entirely, focusing instead upon the great likelihood that the issue will recur *between the defendant and the other members*

of the public at large without ever reaching us. Arguably those cases have been limited to their facts, or to the narrow areas of abortion and election rights, by our more recent insistence that, at least in the absence of a class action, the "capable of repetition" doctrine applies only where "there [is] a 'reasonable expectation'" that the "*same complaining party*" would be subjected to the same action again. *Hunt*, 455 U. S., at 482 (emphasis added), quoting *Weinstein*, 423 U. S., at 149; see *Burlington Northern R. Co.*, *supra*, at 436, n. 4; *Illinois Elections Bd.* v. *Socialist Workers Party*, 440 U. S. 173, 187 (1979). If those earlier cases have not been so limited, however, the conditions for their application do not in any event exist here. There is no extraordinary improbability of the present issue's reaching us as a traditionally live controversy. It would have done so in this very case if Smith had not chosen to leave public school. In sum, on any analysis, the proposition the Court asserts in the present case—that probability need not be shown in order to establish the "same-party-recurrence" exception to mootness—is a significant departure from settled law.

II

If our established mode of analysis were followed, the conclusion that a live controversy exists in the present case would require a demonstrated probability that *all* of the following events will occur: (1) Smith will return to public school; (2) he will be placed in an educational setting that is unable to tolerate his dangerous behavior; (3) he will again engage in dangerous behavior; and (4) local school officials will again attempt unilaterally to change his placement and the state defendants will fail to prevent such action. The Court spends considerable time establishing that the last two of these events are likely to recur, but relegates to a footnote its discussion of the first event, upon which all others depend, and only briefly alludes to the second. Neither the facts in

the record, nor even the extrarecord assurances of counsel, establish a demonstrated probability of either of them.

With respect to whether Smith will return to school, at oral argument Smith's counsel forthrightly conceded that she "cannot represent whether in fact either of these students will ask for further education from the Petitioners." Tr. of Oral Arg. 23. Rather, she observed, respondents would "look to [our decision in this case] to find out what will happen after that." *Id.*, at 23–24. When pressed, the most counsel would say was that, in her view, the 20-year-old Smith *could* seek to return to public school because he has not graduated, he is handicapped, and he has a right to an education. *Id.*, at 27. I do not perceive the principle that would enable us to leap from the proposition that Smith could reenter public school to the conclusion that it is a demonstrated probability he will do so.

The Court nevertheless concludes that "there is at the very least a reasonable expectation" that Smith will return to school. *Ante*, at 319, n. 6. I cannot possibly dispute that on the basis of the Court's terminology. Once it is accepted that a "reasonable expectation" can exist without a demonstrable probability that the event in question will occur, the phrase has been deprived of all meaning, and the Court can give it whatever application it wishes without fear of effective contradiction. It is worth pointing out, however, how slim are the reeds upon which this conclusion of "reasonable expectation" (whatever that means) rests. The Court bases its determination on three observations from the record and oral argument. First, it notes that Smith has been pressing this lawsuit since 1980. It suffices to observe that the equivalent argument can be made in every case that remains active and pending; we have hitherto avoided equating the existence of a case or controversy with the existence of a lawsuit. Second, the Court observes that Smith has "as great a need of a high school education and diploma as any of his peers." *Ibid.* While this is undoubtedly good advice, it hardly estab-

lishes that the 20-year-old Smith is likely to return to high school, much less to public high school. Finally, the Court notes that counsel "advises us that [Smith] is awaiting the outcome of this case to decide whether to pursue his degree." *Ibid.* Not only do I not think this establishes a current case or controversy, I think it a most conclusive indication that no current case or controversy exists. We do not sit to broaden decisionmaking options, but to adjudicate the lawfulness of acts that have happened or, at most, are about to occur.

The conclusion that the case is moot is reinforced, moreover, when one considers that, even if Smith does return to public school, the controversy will still not recur unless he is again placed in an educational setting that is unable to tolerate his behavior. It seems to me not only not demonstrably probable, but indeed quite unlikely, given what is now known about Smith's behavioral problems, that local school authorities would again place him in an educational setting that could not control his dangerous conduct, causing a suspension that would replicate the legal issues in this suit. The majority dismisses this further contingency by noting that the school authorities have an obligation under the EHA to provide an "appropriate" education in "the least restrictive environment." *Ante*, at 321. This means, however, the least restrictive environment appropriate for the particular child. The Court observes that "the preparation of an [individualized educational placement]" is "an inexact science at best," *ibid.*, thereby implying that the school authorities are likely to get it wrong. Even accepting this assumption, which seems to me contrary to the premises of the Act, I see no reason further to assume that they will get it wrong by making the same mistake they did last time—assigning Smith to too *un*restrictive an environment, from which he will thereafter be suspended—rather than by assigning him to too *restrictive* an environment. The latter, which seems to me more likely than the former (though both combined are much less likely than a correct placement), might produce a law-

suit, but not a lawsuit involving the issues that we have before us here.

III

THE CHIEF JUSTICE joins the majority opinion on the ground, not that this case is not moot, but that where the events giving rise to the mootness have occurred after we have granted certiorari we may disregard them, since mootness is only a prudential doctrine and not part of the "case or controversy" requirement of Art. III. I do not see how that can be. There is no more reason to intuit that mootness is merely a prudential doctrine than to intuit that initial standing is. Both doctrines have equivalently deep roots in the common-law understanding, and hence the constitutional understanding, of what makes a matter appropriate for judicial disposition. See *Flast* v. *Cohen*, 392 U. S. 83, 95 (1968) (describing mootness and standing as various illustrations of the requirement of "justiciability" in Art. III).

THE CHIEF JUSTICE relies upon the fact that an 1895 case discussing mootness, *Mills* v. *Green*, 159 U. S. 651, makes no mention of the Constitution. But there is little doubt that the Court believed the doctrine called into question the Court's power and not merely its prudence, for (in an opinion by the same Justice who wrote *Mills*) it had said two years earlier:

> "[T]he court is not *empowered* to decide moot questions or abstract propositions, or to declare . . . principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel . . . can enlarge the *power*, or affect the duty, of the court in this regard." *California* v. *San Pablo & Tulare R. Co.*, 149 U. S. 308, 314 (1893) (Gray, J.) (emphasis added).

If it seems peculiar to the modern lawyer that our 19th-century mootness cases make no explicit mention of Art. III, that is a peculiarity shared with our 19th-century, and even

our early 20th-century, standing cases. As late as 1919, in dismissing a suit for lack of standing we said simply:

> "Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it." *Blair* v. *United States*, 250 U. S. 273, 279.

See also, *e. g.*, *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540, 550 (1912); *Southern R. Co.* v. *King*, 217 U. S. 524, 534 (1910); *Turpin* v. *Lemon*, 187 U. S. 51, 60–61 (1902); *Tyler* v. *Judges of Court of Registration*, 179 U. S. 405, 409 (1900). The same is also true of our early cases dismissing actions lacking truly adverse parties, that is, collusive actions. See, *e. g.*, *Cleveland* v. *Chamberlain*, 1 Black 419, 425–426 (1862); *Lord* v. *Veazie*, 8 How. 251, 254–256 (1850). The explanation for this ellipsis is that the courts simply chose to refer directly to the traditional, fundamental limitations upon the powers of common-law courts, rather than referring to Art. III which in turn adopts those limitations through terms ("The judicial Power"; "Cases"; "Controversies") that have virtually no meaning except by reference to that tradition. The ultimate circularity, coming back in the end to tradition, is evident in the statement by Justice Field:

> "By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case." *In re Pacific Railway Comm'n*, 32 F. 241, 255 (CC ND Cal. 1887).

See also 2 M. Farrand, Records of the Federal Convention of 1787, p. 430 (rev. ed. 1966):

> "Docr. Johnson moved to insert the words 'this Constitution and the' before the word 'laws.'
>
> "Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department.
>
> "The motion of Docr. Johnson was agreed to nem: con: it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature."

In sum, I cannot believe that it is only our prudence, and nothing inherent in the understood nature of "The judicial Power," U. S. Const., Art. III, § 1, that restrains us from pronouncing judgment in a case that the parties have settled, or a case involving a nonsurviving claim where the plaintiff has died, or a case where the law has been changed so that the basis of the dispute no longer exists, or a case where conduct sought to be enjoined has ceased and will not recur. Where the conduct has ceased for the time being but there is a demonstrated probability that it *will* recur, a real-life controversy between parties with a personal stake in the outcome continues to exist, and Art. III is no more violated than it is violated by entertaining a declaratory judgment action. But that is the limit of our power. I agree with THE CHIEF JUSTICE to this extent: the "yet evading review" portion of our "capable of repetition, yet evading review" test is prudential; whether or not that criterion is met, a justiciable controversy exists. But the probability of recurrence between the same parties is essential to our jurisdiction as a court, and it is that deficiency which the case before us presents.

It is assuredly frustrating to find that a jurisdictional impediment prevents us from reaching the important merits

issues that were the reason for our agreeing to hear this case. But we cannot ignore such impediments for purposes of our appellate review without simultaneously affecting the principles that govern district courts in their assertion or retention of original jurisdiction. We thus do substantial harm to a governmental structure designed to restrict the courts to matters that actually affect the litigants before them.

CARNEGIE-MELLON UNIVERSITY ET AL. *v.* COHILL, JUDGE, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 86–1021. Argued November 10, 1987—Decided January 20, 1988

A husband and wife (hereinafter respondents) filed a complaint in a Pennsylvania state court against petitioners, the husband's former employer and his former supervisor, alleging a single federal-law age discrimination claim and a number of state-law claims, all arising from the husband's discharge by petitioners. After petitioners removed the case to Federal District Court under 28 U. S. C. § 1441(a), the court granted respondents' motion to amend their complaint to delete the age discrimination allegations and their motion to remand the suit to state court on the ground that such amendment eliminated their sole federal-law claim, which had provided the basis for removal in the first place. The Court of Appeals denied petitioners' application for a writ of mandamus.

Held: A federal district court has discretion under the doctrine of pendent jurisdiction to remand to state court a removed case upon a proper determination that retaining jurisdiction over the case would be inappropriate. Where, as here, all federal-law claims in the action have been eliminated and only pendent state-law claims remain, the district court has a powerful reason to choose not to continue to exercise jurisdiction. A wide discretion to remand rather than to dismiss will enable district courts to deal with appropriate cases involving pendent claims in the manner that best serves the principles of judicial economy, procedural convenience, fairness to litigants, and comity to the States which underlie the pendent jurisdiction doctrine. For example, a remand generally will be preferable to dismissal when the statute of limitations on the plaintiff's state-law claims has expired before the federal court has determined that it should relinquish jurisdiction. Even when the applicable statute of limitations has not expired, a remand may best promote the aforesaid principles, in light of the increased expense and time involved in enforcing state law that dismissal would entail. The fact that the federal removal statute, 28 U. S. C. §§ 1441–1451, explicitly authorizes remand in only two situations inapplicable to this case does not mean that Congress intended to preclude remands of removed cases involving pendent claims. Given that the statute's silence does not negate the courts' undoubted power to dismiss such cases, that silence cannot be

read to negate the power to remand them. Indeed, § 1441(c), which gives district courts discretionary power either to adjudicate or to remand otherwise nonremovable "separate and independent" claims that have been joined with a removable claim, strongly suggests that had Congress decided to address the proper disposition of removed cases involving pendent claims, it would have authorized their remand. The statement in *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U. S. 336, that a case may not be remanded on a ground not specified in the removal statute applies only to situations in which the district court has no authority to decline to hear the removed case, and not to cases like the present in which the district court has undoubted discretion to decline to exercise jurisdiction. The fact that, under the rule announced in this case, a plaintiff might attempt to manipulate the forum by deleting federal-law claims and requesting remand is a concern which should be considered by the district court in deciding whether to remand, but hardly justifies a categorical prohibition on the remand of all cases involving pendent state-law claims. Pp. 348–357.

Affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined, *post*, p. 358.

Walter P. DeForest III argued the cause and filed briefs for petitioners.

Allan J. Opsitnick argued the cause and filed a brief for respondents.*

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*Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *John K. Van de Kamp*, Attorney General of California, *R. H. Connett*, Assistant Attorney General, and *Roderick E. Walston*, Deputy Attorney General, joined by the Attorneys General for their respective States as follows: *Don Siegelman* of Alabama, *Grace Berg Schaible* of Alaska, *John Steven Clark* of Arkansas, *Warren Price III* of Hawaii, *James T. Jones* of Idaho, *Linley E. Pearson* of Indiana, *David L. Armstrong* of Kentucky, *William J. Guste, Jr.*, of Louisiana, *Brian McKay* of Nevada, *Hal Stratton* of New Mexico, *Anthony J. Celebrezze, Jr.*, of Ohio, *Roger A. Tellinghuisen* of South Dakota, *W. J. Michael Cody* of Tennessee, *Jim Mattox* of Texas, *David L. Wilkinson* of Utah, *Kenneth O. Eikenberry* of Washington, and *Donald J. Hanaway* of Wisconsin; and for the Department of Water and Power of the city of Los Angeles by *Adolph Moskovitz* and *Janet K. Goldsmith*.

JUSTICE MARSHALL delivered the opinion of the Court.

The question before us is whether a federal district court has discretion under the doctrine of pendent jurisdiction to remand a properly removed case to state court when all federal-law claims in the action have been eliminated and only pendent state-law claims remain.

I

Respondents, William and Carrie Boyle, commenced this action by filing a complaint against petitioners, Carnegie-Mellon University (CMU) and John Kordesich, in the Court of Common Pleas of Allegheny County, Pennsylvania. CMU is William Boyle's former employer; Kordesich is William Boyle's former supervisor. In the complaint, William Boyle charged CMU with violation of federal and state age-discrimination laws, wrongful discharge, breach of contract, intentional infliction of emotional distress, defamation, and misrepresentation. He stated many of the same claims, as well as tortious interference with a contractual relationship, against Kordesich. Carrie Boyle claimed that these alleged wrongs had caused her to suffer a loss of consortium, loss of companionship, and loss of her husband's household services. All of respondents' claims arose from CMU's discharge of William Boyle.

Petitioners removed the case from state court to the United States District Court for the Western District of Pennsylvania under 28 U. S. C. § 1441(a), which allows a defendant to remove an action that falls within the original jurisdiction of the federal district courts.[1] Petitioners stated that the entire lawsuit fell within the original jurisdiction,

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[1] Section 1441(a) provides:

"Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

and hence within the removal jurisdiction, of the District Court because the complaint stated a claim arising under the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U. S. C. §§ 621–634, and the state-law claims in the complaint were pendent to this federal-law claim. Respondents did not contest the removal.

Six months later, respondents moved to amend their complaint to delete the allegations of age discrimination and defamation and the request for damages for loss of consortium. In this motion, respondents stated that they now believed these claims were not tenable. At the same time, respondents filed a motion, conditional upon amendment of the complaint, to remand the suit to state court. Respondents noted that the amendment would eliminate their sole federal-law claim, which had provided the basis for removal of the case, and argued that a remand to state court was appropriate in these circumstances.

After granting the motion to amend, the District Court remanded the remaining claims to the state court in which respondents initially had filed the action. *Boyle* v. *Carnegie-Mellon University*, Civ. Action No. 84–2285 (Oct. 10, 1985). In its opinion, the District Court first examined whether any provision of the federal removal statute, 28 U. S. C. §§ 1441–1451, supported a remand. The court noted that two sections of the statute authorize district courts to remand after removal. Under 28 U. S. C. § 1447(c), a court shall remand any case that "was removed improvidently and without jurisdiction";[2] under 28 U. S. C. § 1441(c), a court may remand any claim that is both independently nonremovable and "separate and independent" of the claim providing the basis for

[2] Section 1447(c) provides, in pertinent part:

"If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs."

removal of the case.[3] The court held that § 1447(c) did not apply because the removal was jurisdictionally proper and that § 1441(c) did not apply because the remaining state-law claims in the case, although independently nonremovable, were pendent to, rather than separate and independent of, the federal-law claim that had provided the basis for removal. The District Court then stated that in *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U. S. 336 (1976), this Court had suggested that a district court could not remand a removed case or claim without specific statutory authorization. The District Court noted, however, that a number of appellate decisions since *Thermtron* had approved the remand of removed pendent state-law claims when the federal-law claim providing the basis for removal had been eliminated from the suit. The court found these later decisions persuasive and consequently opted to remand respondents' remaining state-law claims.

Petitioners filed a petition for writ of mandamus with the United States Court of Appeals for the Third Circuit, and a divided panel granted the petition.[4] 41 FEP Cases 1046 (1986). Both the majority and the dissent agreed with the District Court's conclusion that neither § 1447(c) nor § 1441(c) authorized a remand in this case. The majority, after noting a division among the Circuits on the question, held that under *Thermtron* this absence of statutory authorization precluded the District Court from ordering a remand. The dissent

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[3] Section 1441(c) provides:

"Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

[4] Petitioners also appealed the District Court's decision. The Court of Appeals, however, dismissed the appeal on the ground that 28 U. S. C. § 1447(d) bars appeals from remands to state courts with a single exception not applicable to this case.

countered that *Thermtron*'s admonition against remanding removed cases to state court without specific statutory authorization did not extend to cases involving pendent jurisdiction. The dissent noted that under the pendent jurisdiction doctrine, a district court has discretion to dismiss without prejudice cases involving pendent claims, and argued that fairness, efficiency, comity, and common sense supported the authority of removal courts to remand such cases as well.

The Court of Appeals granted respondents' petition for rehearing en banc and vacated the panel opinions and writ of mandamus. 41 FEP Cases 1888 (1986). After the rehearing, the en banc court divided evenly on the question whether the District Court had authority to remand respondents' case to state court. Civ. Action No. 85–3619 (Nov. 24, 1986). Accordingly, the court issued an order denying petitioners' application for a writ of mandamus. This order effectively left undisturbed the remand of respondents' case.

We granted certiorari, 479 U. S. 1083 (1987), to resolve the split among the Circuits as to whether a district court has discretion to remand a removed case to state court when all federal-law claims have dropped out of the action and only pendent state-law claims remain.[5] We now affirm.

II

The modern doctrine of pendent jurisdiction stems from this Court's decision in *Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966). Prior to *Gibbs*, this Court had recognized that considerations of judicial economy and procedural convenience justified the recognition of power in the federal courts to decide certain state-law claims involved in cases raising federal

[5] Compare *In re Romulus Community Schools*, 729 F. 2d 431 (CA6 1984), *Fox* v. *Custis*, 712 F. 2d 84 (CA4 1983), and *Hofbauer* v. *Northwestern National Bank of Rochester*, 700 F. 2d 1197 (CA8 1983) (approving remand of remaining pendent state-law claims when all federal claims were eliminated from case), with *Cook* v. *Weber*, 698 F. 2d 907 (CA7 1983), and *In re Greyhound Lines, Inc.*, 598 F. 2d 883 (CA5 1979) (disapproving such remands).

questions. See *Hurn* v. *Oursler*, 289 U. S. 238, 243–247 (1933). The test for determining when a federal court had jurisdiction over such state-law claims was murky, however, and the lower courts experienced considerable difficulty in applying it.[6] In *Gibbs*, the Court responded to this confusion, and the resulting hesitancy of federal courts to recognize jurisdiction over state-law claims, by establishing a new yardstick for deciding whether a federal court has jurisdiction over a state-law claim brought in a case that also involves a federal question. The Court stated that a federal court has jurisdiction over an entire action, including state-law claims, whenever the federal-law claims and state-law claims in the case "derive from a common nucleus of operative fact" and are "such that [a plaintiff] would ordinarily be expected to try them all in one judicial proceeding." 383 U. S., at 725. The Court intended this standard not only to clarify, but also to broaden, the scope of federal pendent jurisdiction. See *ibid.* (stating that the prior approach, at least as applied by lower courts, was "unnecessarily grudging"). According to *Gibbs*, "considerations of judicial economy, convenience and fairness to litigants" support a wide-ranging power in the federal courts to decide state-law claims in cases that also present federal questions. *Id.*, at 726.

At the same time, however, *Gibbs* drew a distinction between the power of a federal court to hear state-law claims and the discretionary exercise of that power. The *Gibbs* Court recognized that a federal court's determination of

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[6] The test established in *Hurn* v. *Oursler* provided that if a plaintiff presented "two distinct grounds," one state and one federal, "in support of a single cause of action," the federal court had jurisdiction over the entire action, but that if the plaintiff's assertions amounted to "two separate and distinct causes of action," the federal court had jurisdiction only over the federal "cause of action." 289 U. S., at 246. The difficulty with this test, as many commentators noted, was that it centered on the inherently elusive concept of a "cause of action." See, *e. g.*, Shulman & Jaegerman, Some Jurisdictional Limitations on Federal Procedure, 45 Yale L. J. 393, 397–410 (1936).

state-law claims could conflict with the principle of comity to the States and with the promotion of justice between the litigating parties. For this reason, *Gibbs* emphasized that "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." *Ibid.* Under *Gibbs*, a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims. When the balance of these factors indicates that a case properly belongs in state court, as when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain,[7] the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice. *Id.*, at 726–727. As articulated by *Gibbs*, the doctrine of pendent jurisdiction thus is a doctrine of flexibility, designed to allow courts to deal with cases involving pendent claims in the manner that most sensibly accommodates a range of concerns and values.

In the case before us, respondents' complaint stated a single federal-law claim and a number of state-law claims. The state-law claims fell within the jurisdiction of the District Court to which the action was removed because they derived

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[7] In *Gibbs*, the Court stated that "if the federal claims are dismissed before trial . . . the state claims should be dismissed as well." 383 U. S., at 726. More recently, we have made clear that this statement does not establish a mandatory rule to be applied inflexibly in all cases. See *Rosado* v. *Wyman*, 397 U. S. 397, 403–405 (1970). The statement simply recognizes that in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims.

The Court in *Gibbs* also indicated that these factors usually will favor a decision to relinquish jurisdiction when "state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought." 383 U. S., at 726.

from the same nucleus of operative fact as the federal-law claim: CMU's dismissal of William Boyle. Under the pendent jurisdiction doctrine set forth in *Gibbs*, however, the District Court had to consider throughout the litigation whether to exercise its jurisdiction over the case. When the single federal-law claim in the action was eliminated at an early stage of the litigation, the District Court had a powerful reason to choose not to continue to exercise jurisdiction. The question that this case presents is whether the District Court could relinquish jurisdiction over the case only by dismissing it without prejudice or whether the District Court could relinquish jurisdiction over the case by remanding it to state court as well.

This Court's crafting of the pendent jurisdiction doctrine in *Gibbs* strongly supports the conclusion that when a district court may relinquish jurisdiction over a removed case involving pendent claims, the court has discretion to remand the case to state court. *Gibbs* itself does not directly address this issue; because the plaintiff in *Gibbs* filed his suit in federal court, remand was not an option in the case, and the Court spoke only of dismissal. But *Gibbs* establishes that the pendent jurisdiction doctrine is designed to enable courts to handle cases involving state-law claims in the way that will best accommodate the values of economy, convenience, fairness, and comity, and *Gibbs* further establishes that the Judicial Branch is to shape and apply the doctrine in that light. Because in some circumstances a remand of a removed case involving pendent claims will better accommodate these values than will dismissal of the case, the animating principle behind the pendent jurisdiction doctrine supports giving a district court discretion to remand when the exercise of pendent jurisdiction is inappropriate.

As many lower courts have noted,[8] a remand generally will be preferable to a dismissal when the statute of limitations on

[8] See, *e. g.*, *In re Romulus Community Schools*, 729 F. 2d, at 439; *Kaib* v. *Pennzoil Co.*, 545 F. Supp. 1267, 1271 (WD Pa. 1982).

the plaintiff's state-law claims has expired before the federal court has determined that it should relinquish jurisdiction over the case. In such a case, a dismissal will foreclose the plaintiff from litigating his claims. This consequence may work injustice to the plaintiff: although he has brought his suit in timely manner, he is time barred from pressing his case.[9] Equally important, and more easily overlooked, the foreclosure of the state-law claims may conflict with the principle of comity to States. The preclusion of valid state-law claims initially brought in timely manner in state court undermines the State's interest in enforcing its law. The operation of state statutes of limitations thus provides a potent reason for giving federal district courts discretion to remand, as well as to dismiss, removed pendent claims.[10]

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[9] Moreover, if a plaintiff bringing suit in state court knows that, notwithstanding the expiration of a statute of limitations, a federal court to which a case is removed must dismiss the case upon deciding that the exercise of pendent jurisdiction would be inappropriate, the plaintiff may well decline to allege any federal-law claims. By forgoing all federal-law claims, the plaintiff can insulate himself from the risk that the combination of removal, dismissal under the pendent jurisdiction doctrine, and the expiration of a statute of limitations will foreclose him from litigating his state-law claims. Such protection will appear especially attractive to a plaintiff who has any doubt about the validity of his federal-law claims, because he will know that if the district court dismisses these claims on the merits prior to trial, the court may well decide that the rest of the case is unsuitable for resolution in a federal court and therefore dismiss the remaining claims. Thus, a rule that would require federal courts to dismiss a removed case that is not suitable for resolution in a federal court would operate not only to foreclose some plaintiffs from litigating their state-law claims, but also to chill other plaintiffs from bringing their federal-law claims.

[10] Petitioners argue that the federal courts do not need discretion to remand because they can retain jurisdiction over any case in which the statute of limitations has expired. See Brief for Petitioners 20. At least one Court of Appeals has made the identical argument. See *Cook* v. *Weber*, 698 F. 2d, at 909. This solution to the problem of an expired statute of limitations, however, is far from satisfying. Under petitioners' suggested approach, district courts would retain jurisdiction over cases that apart

Even when the applicable statute of limitations has not expired, a remand may best promote the values of economy, convenience, fairness, and comity. Both litigants and States have an interest in the prompt and efficient resolution of controversies based on state law. Any time a district court dismisses, rather than remands, a removed case involving pendent claims, the parties will have to refile their papers in state court, at some expense of time and money. Moreover, the state court will have to reprocess the case, and this procedure will involve similar costs. Dismissal of the claim therefore will increase both the expense and the time involved in enforcing state law. Under the analysis set forth in *Gibbs*, this consequence, even taken alone, provides good reason to grant federal courts wide discretion to remand cases involving pendent claims when the exercise of pendent jurisdiction over such cases would be inappropriate.

Petitioners argue that the federal removal statute prohibits a district court from remanding properly removed cases involving pendent claims. This argument is based not on the language of Congress, but on its silence. Petitioners note that the removal statute explicitly authorizes remands in two situations. By failing similarly to provide for remands of removed cases involving pendent claims, petitioners assert, Congress intended to preclude district courts from remanding such cases.

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from the statute-of-limitations concern properly belong in state courts. There is no reason to compel or encourage district courts to retain jurisdiction over such cases when the alternative of a remand is readily available.

In similar vein, the dissent argues that federal courts do not need discretion to remand because some States have saving clauses that alleviate the statute-of-limitations problem arising from the dismissal of cases. But the existence of such clauses in some States, while diminishing the reason for remand in particular cases, hardly reverses our general conclusion that the balance of factors to be weighed under *Gibbs*, considered in light of the range of state statutes of limitations, supports giving federal district courts the authority to remand cases involving pendent claims.

We cannot accept petitioners' reasoning. We do not dispute that Congress could set a limitation of this kind on the federal courts' administration of the doctrine of pendent jurisdiction. But Congress has not done so, expressly or otherwise, in the removal statute. The principal flaw in petitioners' argument is that it fails to recognize that the removal statute does not address specifically *any* aspect of a district court's power to dispose of pendent state-law claims after removal: just as the statute makes no reference to a district court's power to remand pendent claims, so too the statute makes no reference to a district court's power to dismiss them. Yet petitioners concede, as they must, that a federal court has discretion to dismiss a removed case involving pendent claims. Given that Congress' silence in the removal statute does not negate the power to dismiss such cases, that silence cannot sensibly be read to negate the power to remand them.

Indeed, one section of the removal statute strongly suggests that had Congress decided to address the proper disposition of removed cases involving pendent claims, Congress would have authorized the district courts to remand them. In 28 U. S. C. § 1441(c), Congress dealt with the situation in which a claim that would be removable if sued upon alone is joined with one or more "separate and independent" claims that are not themselves removable. The section provides that the entire case may be removed and that the district court, in its discretion, may either adjudicate all claims in the suit or remand the independently nonremovable claims. See n. 3, *supra*. This section is not directly applicable to suits involving pendent claims, because pendent claims are not "separate and independent" within the meaning of the removal statute. See *American Fire & Casualty Co.* v. *Finn*, 341 U. S. 6, 12–14 (1951) (interpreting the "separate and independent" clause). The section, however, clearly manifests a belief that when a court has discretionary jurisdiction over a removed state-law claim and the court chooses not to exer-

cise its jurisdiction, remand is an appropriate alternative. Thus, the removal statute, far from precluding district courts from remanding pendent state-law claims, actually supports such authority.[11]

As petitioners point out, this Court's opinion in *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U. S. 336 (1976), contains some language that could be read to support the opposite conclusion. In *Thermtron*, a District Court remanded a properly removed case to state court on the ground that the federal docket was overcrowded. This Court held that the remand was improper. In so doing, the Court stated several times that a district court may not remand a case to a state court on a ground not specified in the removal statute. See *id.*, at 345. See also *id.*, at 345, n. 9 ("Lower federal courts have uniformly held that cases properly removed from state to federal court within the federal court's jurisdiction may not be remanded for discretionary reasons not authorized by the controlling statute"); *id.*, at 351 ("[W]e are not convinced that Congress ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute"). Petitioners, again noting that the removal statute does not explicitly authorize the remand of cases involving pendent state-law claims, argue that *Thermtron* thus compels a holding that such remands are impermissible.

The language from *Thermtron* that petitioners cite, viewed in isolation, is admittedly far-reaching, but it loses controlling force when read against the circumstances of that case. The

[11] The dissent's claim that our decision renders superfluous the two provisions of the removal statute that authorize remands is unjustified. The remand power that we recognize today derives from the doctrine of pendent jurisdiction and applies only to cases involving pendent claims. Sections 1441(c) and 1447(c), as the dissent recognizes, do not apply to cases over which a federal court has pendent jurisdiction. Thus, the remand authority conferred by the removal statute and the remand authority conferred by the doctrine of pendent jurisdiction overlap not at all.

Thermtron decision was a response to a clearly impermissible remand, of a kind very different from that at issue here. In *Thermtron*, the District Court had no authority to decline to hear the removed case. The court had diversity jurisdiction over the case, which is not discretionary. Thus, the District Court could not properly have eliminated the case from its docket, whether by a remand or by a dismissal. In contrast, when a removed case involves pendent state-law claims, a district court has undoubted discretion to decline to hear the case. The only remaining issue is whether the district court may decline jurisdiction through a remand as well as through a dismissal. The *Thermtron* opinion itself recognized this distinction by stating that federal courts have no greater power to remand cases because of an overcrowded docket than they have to dismiss cases on that ground. *Id.*, at 344. The implication of this statement, which is confirmed by common sense, is that an entirely different situation is presented when the district court has clear power to decline to exercise jurisdiction. *Thermtron* therefore does not control the decision in this case.[12]

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[12] The dissent's reliance on *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283 (1938), is misplaced for a similar reason. In *St. Paul*, the defendant removed a diversity case to federal court, and the plaintiff later reduced the amount of damages claimed to a figure below the jurisdictional amount. The District Court remanded the case to state court, but this Court held that the remand was impermissible. The Court stated that "events occurring subsequent to removal which reduce the amount recoverable . . . do not oust the district court's [diversity] jurisdiction." *Id.*, at 293. The Court then held that because the District Court continued to have diversity jurisdiction over the case, the court could not relinquish the case, whether through a dismissal or through a remand. See *id.*, at 296. The argument cited by the dissent, focusing on forum manipulation concerns, provided an auxiliary policy consideration supporting the Court's determination that the District Court's remand was inappropriate. We agree that forum manipulation concerns are legitimate and serious. See *infra*, at 357. We do not think, however, that *St. Paul* fairly, or even plausibly, can be read to suggest that these concerns necessitate a blanket

Petitioners also argue that giving district courts discretion to remand cases involving pendent state-law claims will allow plaintiffs to secure a state forum through the use of manipulative tactics. Petitioners' concern appears to be that a plaintiff whose suit has been removed to federal court will be able to regain a state forum simply by deleting all federal-law claims from the complaint and requesting that the district court remand the case. Brief for Petitioners 18–20. This concern, however, hardly justifies a categorical prohibition on the remand of cases involving state-law claims regardless of whether the plaintiff has attempted to manipulate the forum and regardless of the other circumstances in the case. A district court can consider whether the plaintiff has engaged in any manipulative tactics when it decides whether to remand a case. If the plaintiff has attempted to manipulate the forum, the court should take this behavior into account in determining whether the balance of factors to be considered under the pendent jurisdiction doctrine support a remand in the case. The district courts thus can guard against forum manipulation without a blanket rule that would prohibit the remand of all cases involving pendent state-law claims.

We conclude that a district court has discretion to remand to state court a removed case involving pendent claims upon a proper determination that retaining jurisdiction over the case would be inappropriate. The discretion to remand enables district courts to deal with cases involving pendent claims in the manner that best serves the principles of economy, convenience, fairness, and comity which underlie the pendent jurisdiction doctrine. Such discretion is precluded neither by the removal statute nor by our decision in *Thermtron*. We therefore affirm the decision below denying the petition for a writ of mandamus.

It is so ordered.

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prohibition on remands when the federal district court's jurisdiction over a case is inherently discretionary.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

The Court today discovers an inherent power in the federal judiciary to remand properly removed cases to state court for reasons of "economy, convenience, fairness, and comity." *Ante*, at 351. Because I continue to believe that cases may be remanded only for reasons authorized by statute, see *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U. S. 336, 342 (1976), I dissent.

I

Respondents William and Carrie Boyle brought suit in Pennsylvania state court against William Boyle's former employer and supervisor, petitioners Carnegie-Mellon University and William Kordesich, stating claims under both state law and the federal Age Discrimination in Employment Act (ADEA), 29 U. S. C. § 626(c)(1). The case was removed to the United States District Court for the Western District of Pennsylvania pursuant to 28 U. S. C. § 1441 on the basis of the federal ADEA claim. The Boyles did not contest the removal or move to remand at that time.

After some six months of discovery, the Boyles moved to delete their age discrimination claim and to remand the case to state court, explaining that their age discrimination claim had proved to be "not tenable." Apparently, the Boyles had only then discovered that their failure to file a timely age discrimination charge with a federal or state agency precluded them from asserting a claim under the ADEA. See 29 U. S. C. §§ 626(d), 633(b). Counsel for the Boyles explained before this Court that his principal reason for seeking the remand was to avoid a prompt trial on the state claims. Tr. of Oral Arg. 28–29. He perceived that the opportunities for extracting a favorable settlement from Carnegie-Mellon would be greater if the case were remanded, because the state court dockets in Allegheny County were considerably more congested than the federal court dockets in the Western District of Pennsylvania.

The Federal District Court granted the Boyles' motions to amend and to remand. The court recognized that neither 28 U. S. C. § 1447(c) nor 28 U. S. C. § 1441(c), the two statutory provisions authorizing remand, was applicable in this case. The court nonetheless held that, because it could dismiss an action from which all federal claims had been deleted, see *Mine Workers* v. *Gibbs*, 383 U. S. 715, 725–727 (1966), it could also remand such an action to state court.

Carnegie-Mellon then petitioned for a writ of mandamus from the Court of Appeals for the Third Circuit. A divided panel granted the petition and directed the District Court to vacate its remand order. The panel concluded that the District Court was foreclosed by this Court's decision in *Thermtron* from remanding cases to state courts for reasons not specified in a federal statute.

The Court of Appeals reheard the matter en banc. An equally divided court denied Carnegie-Mellon's petition for a writ of mandamus.

II

This Court has now affirmed. The Court holds that the pendent jurisdiction doctrine set forth in *Gibbs* allows federal judges to remand a properly removed case to state court whenever all federal claims have been deleted. There is no statutory basis for this holding. But the Court discovers an inherent authority to remand whenever a federal judge decides that "the values of economy, convenience, fairness, and comity" would thereby be served. This result is inconsistent with Congress' understanding of the federal courts' remand authority as well as with the precedents of this Court.

Congress has enacted two statutory provisions governing remands from federal court to state court: 28 U. S. C. § 1447(c), which requires the remand of cases removed "improvidently and without jurisdiction," and 28 U. S. C. § 1441 (c), which permits the remand of "separate and independent" claims that are "not otherwise within [the district court's] original jurisdiction." The latter provision does not apply to

pendent claims such as those asserted here. There would have been little reason for Congress to have enacted either § 1447(c) or § 1441(c) had Congress perceived the federal courts to possess an inherent authority to remand claims that might better be decided by the state courts. The Court thus renders § 1441(c) wholly superfluous in contravention of the prevailing rule that courts "should not and do not suppose that Congress intended to enact unnecessary statutes." *Jackson* v. *Kelly*, 557 F. 2d 735, 740 (CA10 1977) (en banc); see also *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955); *Sutton* v. *United States*, 819 F. 2d 1289, 1295 (CA5 1987) (citing *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534 (1940)); *Ziegler Coal Co.* v. *Kleppe*, 175 U. S. App. D. C. 371, 379, 536 F. 2d 398, 406 (1976).

The Court rejects the foregoing argument on the ground that Congress has provided no express statutory authority for the dismissal of pendent claims. See *ante*, at 354. This ignores the very different origins of the power to dismiss and the power to remand. Courts have historically possessed an inherent power to dismiss suits for discretionary reasons such as failure to prosecute. See, *e. g.*, *Link* v. *Wabash R. Co.*, 370 U. S. 626, 629–631 (1962). The courts have not heretofore been recognized to possess any inherent power to remand.[1]

In *Thermtron*, we held that a Federal District Judge had exceeded his authority in remanding a properly removed diversity action "on grounds not permitted by the controlling statute," 423 U. S., at 345, namely, that the case would be adjudicated more quickly in state court than in federal court. In support of this holding, we observed that "[l]ower federal courts have uniformly held that cases properly removed from

[1] A federal court might logically be assumed to have greater inherent authority to transfer a case to another federal court than to a state court. Yet, Congress has also delineated by statute or rule the circumstances in which a case may be transferred from one federal court to another. See, *e. g.*, 28 U. S. C. §§ 1404(a), 1406(a), 2241; Fed. Rule Crim. Proc. 21.

state to federal court within the federal court's jurisdiction may not be remanded for discretionary reasons not authorized by the controlling statute." *Id.*, at 345, n. 9 (citing *Romero* v. *ITE Imperial Corp.*, 332 F. Supp. 523, 526 (PR 1971); *Isbrandtsen Co.* v. *District 2, Marine Engineers Beneficial Assn.*, 256 F. Supp. 68, 77 (EDNY 1966); *Davis* v. *Joyner*, 240 F. Supp. 689, 690 (EDNC 1964); *Vann* v. *Jackson*, 165 F. Supp. 377, 381 (EDNC 1958)). Moreover, in holding that a remand on grounds not specified in the statute was reviewable on mandamus notwithstanding the prohibition on appellate review of remand orders contained in 28 U. S. C. § 1447(d), we expressed skepticism that "Congress ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute." 423 U. S., at 351. Nevertheless, the Court itself grants the district courts virtual carte blanche to remand pendent claims for the amorphous reasons of "economy, convenience, fairness, and comity" that may seem justifiable to the majority but that have not been recognized by Congress. This action cannot be reconciled with the holding in *Thermtron* that cases cannot be remanded for nonstatutory reasons.

The decision today is also difficult to reconcile with *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283 (1938), which held that a properly removed diversity action should not have been remanded to state court when the damages at issue later appeared to be less than the jurisdictional amount. In concluding that the status of the case at the time of removal was controlling, the Court reasoned:

> "If the plaintiff could, no matter how *bona fide* his original claim in the state court, reduce the amount of his demand to defeat federal jurisdiction the defendant's supposed statutory right of removal would be subject to

> the plaintiff's caprice. The claim, whether well or ill founded in fact, fixes the right of the defendant to remove, and the plaintiff ought not to be able to defeat that right and bring the cause back to the state court at his election." *Id.*, at 294.

To permit a plaintiff to "bring the cause back to the state court at his election" by voluntarily dismissing his federal claims, as the Court does today, will likewise subject "the defendant's supposed statutory right of removal . . . to the plaintiff's caprice." The Court has thereby provided a new tactical weapon to plaintiffs like the Boyles who may be less interested in securing a prompt trial on the merits than in causing the litigation to become so burdensome to the defendants that they will accede to a favorable settlement.

Nothing in *Gibbs* justifies the result reached today. The majority acknowledges that no "direc[t]" authority for today's holding can be found in *Gibbs*, which involved an action that had been filed initially in federal court. See *ante*, at 351. The *Gibbs* opinion did not even suggest any inherent power in the federal courts to remand pendent claims rather than to retain such claims or to dismiss them without prejudice. And no case here either before or after *Gibbs* provides any stronger support for today's holding.

The Court's decision has the peculiar result of treating plaintiffs who bring suit in federal court less favorably than plaintiffs who bring suit in state court. If the Boyles had commenced this suit in federal court and their federal claims were later dismissed, the Federal District Judge could only have dismissed the remaining pendent claims or decided those claims himself. Because the Boyles instead commenced this suit in state court, however, the District Judge had the additional option of ordering a remand. The principal advantage to plaintiffs of this third option is that their state claims are less likely to be dismissed as time barred.

Accordingly, plaintiffs with claims arising under both federal and state law now will be encouraged to bring suit in state court, even when the state courts are as overburdened as those in Allegheny County are alleged to be, rather than in the federal courts that have been described as the "primary guardians" of federal rights. *Steffel* v. *Thompson*, 415 U. S. 452, 463 (1974). In addition, defendants who are able to afford the costs and delays associated with a one-way trip to federal court but not the additional costs and delays associated with a round trip may now be discouraged from exercising their statutory right to removal in cases involving both federal and state claims.[2]

There is some incongruity in the Court's invocation of federal-state "comity" in support of a holding whose principal effect will be to relieve plaintiffs from state statutes of limitations. See *ante*, at 352. It seems unnecessary for this Court to protect plaintiffs whose federal claims prove "not tenable" from the operation of state statutes of limitations when the States have shown themselves capable of achieving the same result through saving clauses similar to that enacted by Pennsylvania. See 42 Pa. Cons. Stat. § 5535(a) (1982).[3] Neither the parties nor the courts below have suggested that the Boyles would not have been protected by the

[2] While the majority contends that the use of remands rather than dismissals will save time and money for the state courts, the record contains no support for this assertion. I would think that the costs to the state courts of processing a new case are not appreciably different from the costs of processing a remanded case. Furthermore, to the extent that the federal courts will now remand pendent claims that they previously would have retained, today's holding may result in increased costs for the state courts.

[3] Section 5535(a) provides, in pertinent part, that "[i]f a civil action or proceeding is timely commenced and is terminated, a party . . . may . . . commence a new action or proceeding upon the same cause of action within one year after the termination." This provision is inapplicable to proceedings terminated by "a voluntary nonsuit, a discontinuance, a dismissal for neglect to prosecute the action or proceeding, or a final judgment upon the merits."

Pennsylvania saving clause had their federal claims been dismissed involuntarily rather than at their own behest.[4]

In sum, because I believe that any authority to remand properly removed pendent claims must come from Congress, I respectfully dissent.

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[4]The majority largely ignores the availability of state saving clauses in seeking to justify today's result on the ground that plaintiffs like the Boyles would otherwise protect themselves against "the combination of removal, dismissal under the pendent jurisdiction doctrine, and the expiration of a statute of limitations" by forgoing their federal-law claims. *Ante*, at 352, n. 9.

UNITED SAVINGS ASSOCIATION OF TEXAS *v.* TIMBERS OF INWOOD FOREST ASSOCIATES, LTD.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 86–1602. Argued December 1, 1987—Decided January 20, 1988

When a bankruptcy petition is filed, § 362(a) of the Bankruptcy Code provides an automatic stay of actions taken to realize the value of collateral given by the debtor. Section 362(d) authorizes the bankruptcy court to grant relief from the stay "(1) for cause, including the lack of adequate protection of an interest in property of . . . [a] party in interest," or "(2) with respect to a stay of an act against property," if the debtor does not have an equity in such property (*i. e.*, the creditor is undersecured) and the property is "not necessary to an effective reorganization." Section 361 provides that adequate protection of an entity's interest in property may be provided by granting such relief "as will result in the realization by such entity of the indubitable equivalent of its interest." After respondent filed a petition for reorganization under Chapter 11 of the Code, petitioner, an undersecured creditor, moved the Bankruptcy Court for relief from the § 362(a) stay on the ground that there was a lack of "adequate protection" of its interest within the meaning of § 362(d)(1). The court granted relief, conditioning continuance of the stay on monthly payments by respondent on the estimated amount realizable on the foreclosure that the stay prevented. The District Court affirmed, but the Court of Appeals reversed.

Held: Undersecured creditors are not entitled to compensation under § 362(d)(1) for the delay caused by the automatic stay in foreclosing on their collateral. Pp. 370–380.

(a) The language of other Code provisions that deal with the rights of secured creditors, and the substantive dispositions that those provisions effect, establish that the "interest in property" protected by § 362(d)(1) does not include a secured party's right to immediate foreclosure. First, petitioner's contrary interpretation contradicts the carefully drawn substantive disposition effected by § 506(b), which codifies the pre-Code rule denying undersecured creditors postpetition interest on their *claims*. Had Congress nevertheless meant to give undersecured creditors interest on the value of their *collateral*, it would have said so plainly in § 506(b). Moreover, the meaning of § 362(d)(1)'s "interest in property" phrase is clarified by the use of similar terminology in § 506(a), where it must be interpreted to mean only the creditor's security inter-

est in the property without regard to his right to immediate possession on default. Second, § 552(b), which makes possession of a perfected security interest in postpetition rents or profits from collateral a condition of having them applied to satisfy the secured creditor's claim ahead of the claims of unsecured creditors, is inconsistent with petitioner's interpretation of § 362(d)(1), under which the undersecured creditor who lacks such a perfected security interest in effect could achieve the same result by demanding the "use value" of his collateral. Third, petitioner's interpretation of § 362(d)(1) makes a practical nullity of § 362(d)(2), which on petitioner's theory would be of use only to a secured creditor who was fully protected both as to the value of, and interest on, its collateral, but nonetheless wanted to foreclose. Petitioner's contention that undersecured creditors will face inordinate and extortionate delay if they are denied compensation under § 362(d)(1) is also belied by § 362(d)(2), which requires relief from the stay unless the *debtor* establishes a reasonable possibility of a successful reorganization within a reasonable time, and under which numerous cases have provided relief within less than a year from the filing of the bankruptcy petition. Pp. 370–376.

(b) Denying petitioner compensation under § 362(d)(1) is not inconsistent with § 361(3)'s use of the phrase "indubitable equivalent." Although the same phrase appears in § 1129(b), under which section, as a condition for confirmation of a reorganization plan, a secured claimant has a right to receive the present value of his collateral (including interest if the claim is to be paid over time), the source of the right in § 1129 is not the "indubitable equivalent" language but the provision guaranteeing payments of a value, "*as of the effective date of the plan*," equal to the value of the collateral. Similarly, petitioner's contention that, since general administrative expenses do not have priority over secured claims, see §§ 506(c), 507(a), the Code embodies a principle prohibiting secured creditors from bearing any of the costs of reorganization, is without merit. Congress could not have intended that its readoption of the pre-Code administrative expenses rule would work a change in the also readopted pre-Code rule denying undersecured creditors postpetition interest. Finally, although failure to interpret § 362(d)(1) to require compensation for undersecured creditors appears inconsistent with § 726(a)(5), which allows postpetition interest on unsecured claims when the debtor proves solvent, this anomaly pertains to such a rare occurrence that it is likely the product of congressional inadvertence, and, in any case, its inequitable effects are entirely avoidable. Pp. 377–379.

(c) General statements in the legislative history of §§ 361 and 362(d)(1) that "[s]ecured creditors should not be deprived of the benefit of their bargain" are inadequate to overcome the plain textual indication in

§§ 506 and 362(d)(2) of Congress' intent, as discussed above. It is most improbable that Congress would have made a major change entitling undersecured creditors to postpetition interest without specifically mentioning it in the legislative history. Petitioner's argument that pre-Code Chapter XI gave undersecured creditors the absolute right to foreclose, and that the silence of the Code's legislative history as to the withdrawal of that right indicates a congressional intent to provide interest on the collateral during the stay as a substitute, is flawed. The authorities are far from clear that there was a distinctive Chapter XI rule of absolute entitlement to foreclose, but, even assuming there was, § 362(d)(2) indicates that, in enacting Chapter 11 of the current Code, Congress adopted the approach of pre-Code Chapters X and XII, under which the undersecured creditor did not have such an absolute right. Pp. 379–382.

808 F. 2d 363, affirmed.

SCALIA, J., delivered the opinion for a unanimous Court.

H. Miles Cohn argued the cause and filed briefs for petitioner.

Leonard H. Simon argued the cause for respondent. With him on the brief were *Daphne Levey* and *Timothy J. Henderson.**

JUSTICE SCALIA delivered the opinion of the Court.

Petitioner United Savings Association of Texas seeks review of an en banc decision of the United States Court of Appeals for the Fifth Circuit, holding that petitioner was not entitled to receive from respondent debtor, which is under-

*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Fried*, *Assistant Attorney General Willard*, and *Deputy Solicitor General Cohen;* for the California League of Savings Institutions et al. by *John A. Graham;* for the National Commercial Finance Association by *A. Bruce Schimberg*, *Rex E. Lee*, *J. Ronald Trost*, *Shalom L. Kohn*, and *Frank R. Kennedy;* and for Thomas H. Jackson, *pro se*.

Briefs of *amici curiae* urging affirmance were filed for Global Marine Inc. by *Harvey R. Miller*, *D. J. Baker*, and *Martin J. Bienenstock;* and for the National Association of Credit Management et al. by *Richard Levin* and *Kenneth N. Klee*.

Raymond T. Nimmer, *pro se*, and *Edward L. Ripley*, *pro se*, filed a brief for themselves as *amici curiae*.

going reorganization in bankruptcy, monthly payments for the use value of the loan collateral which the bankruptcy stay prevented it from possessing. *In re Timbers of Inwood Forest Associates, Ltd.*, 808 F. 2d 363 (1987). We granted certiorari, 481 U. S. 1068 (1987), to resolve a conflict in the Courts of Appeals regarding application of §§ 361 and 362(d)(1) of the Bankruptcy Code, 11 U. S. C. §§ 361 and 362(d)(1) (1982 ed. and Supp. IV). Compare *Grundy Nat. Bank* v. *Tandem Mining Corp.*, 754 F. 2d 1436, 1440–1441 (CA4 1985); *In re American Mariner Industries, Inc.*, 734 F. 2d 426, 432–435 (CA9 1984); see also *In re Briggs Transp. Co.*, 780 F. 2d 1339, 1348–1351 (CA8 1985).

I

On June 29, 1982, respondent Timbers of Inwood Forest Associates, Ltd., executed a note in the principal amount of $4,100,000. Petitioner is the holder of the note as well as of a security interest created the same day in an apartment project owned by respondent in Houston, Texas. The security interest included an assignment of rents from the project. On March 4, 1985, respondent filed a voluntary petition under Chapter 11 of the Bankruptcy Code, 11 U. S. C. § 101 *et seq.* (1982 ed. and Supp. IV), in the United States Bankruptcy Court for the Southern District of Texas.

On March 18, 1985, petitioner moved for relief from the automatic stay of enforcement of liens triggered by the petition, see 11 U. S. C. § 362(a), on the ground that there was lack of "adequate protection" of its interest within the meaning of 11 U. S. C. § 362(d)(1). At a hearing before the Bankruptcy Court, it was established that respondent owed petitioner $4,366,388.77, and evidence was presented that the value of the collateral was somewhere between $2,650,000 and $4,250,000. The collateral was appreciating in value, but only very slightly. It was therefore undisputed that petitioner was an undersecured creditor. Respondent had agreed to pay petitioner the postpetition rents from the

apartment project (covered by the after-acquired property clause in the security agreement), minus operating expenses. Petitioner contended, however, that it was entitled to additional compensation. The Bankruptcy Court agreed and on April 19, 1985, it conditioned continuance of the stay on monthly payments by respondent, at the market rate of 12% per annum, on the estimated amount realizable on foreclosure, $4,250,000—commencing six months after the filing of the bankruptcy petition, to reflect the normal foreclosure delays. *In re Bear Creek Ministorage, Inc.*, 49 B. R. 454 (1985) (editorial revision of earlier decision). The court held that the postpetition rents could be applied to these payments. See *id.*, at 460. Respondent appealed to the District Court and petitioner cross-appealed on the amount of the adequate protection payments. The District Court affirmed but the Fifth Circuit en banc reversed.

We granted certiorari to determine whether undersecured creditors are entitled to compensation under 11 U. S. C. § 362(d)(1) for the delay caused by the automatic stay in foreclosing on their collateral.

II

When a bankruptcy petition is filed, § 362(a) of the Bankruptcy Code provides an automatic stay of, among other things, actions taken to realize the value of collateral given by the debtor. The provision of the Code central to the decision of this case is § 362(d), which reads as follows:

> "On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—
>
> "(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or
>
> "(2) with respect to a stay of an act against property under subsection (a) of this section, if—

"(A) the debtor does not have an equity in such property; and

"(B) such property is not necessary to an effective reorganization."

The phrase "adequate protection" in paragraph (1) of the foregoing provision is given further content by § 361 of the Code, which reads in relevant part as follows:

"When adequate protection is required under section 362 . . . of this title of an interest of an entity in property, such adequate protection may be provided by—

"(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title . . . results in a decrease in the value of such entity's interest in such property;

"(2) providing to such entity an additional or replacement lien to the extent that such stay . . . results in a decrease in the value of such entity's interest in such property; or

"(3) granting such other relief . . . as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property."

It is common ground that the "interest in property" referred to by § 362(d)(1) includes the right of a secured creditor to have the security applied in payment of the debt upon completion of the reorganization; and that that interest is not adequately protected if the security is depreciating during the term of the stay. Thus, it is agreed that if the apartment project in this case had been declining in value petitioner would have been entitled, under § 362(d)(1), to cash payments or additional security in the amount of the decline, as § 361 describes. The crux of the present dispute is that petitioner asserts, and respondent denies, that the phrase "interest in property" also includes the secured party's right (suspended by the stay) to take immediate possession of the defaulted

security, and apply it in payment of the debt. If that right is embraced by the term, it is obviously not adequately protected unless the secured party is reimbursed for the use of the proceeds he is deprived of during the term of the stay.

The term "interest in property" certainly summons up such concepts as "fee ownership," "life estate," "co-ownership," and "security interest" more readily than it does the notion of "right to immediate foreclosure." Nonetheless, viewed in the isolated context of § 362(d)(1), the phrase could reasonably be given the meaning petitioner asserts. Statutory construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, see, *e. g.*, *Sorenson* v. *Secretary of Treasury*, 475 U. S. 851, 860 (1986), or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law, see, *e. g.*, *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 54 (1987); *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U. S. 609, 631–632 (1973); *Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303, 307–308 (1961). That is the case here. Section 362(d)(1) is only one of a series of provisions in the Bankruptcy Code dealing with the rights of secured creditors. The language in those other provisions, and the substantive dispositions that they effect, persuade us that the "interest in property" protected by § 362(d)(1) does not include a secured party's right to immediate foreclosure.

Section 506 of the Code defines the amount of the secured creditor's allowed secured claim and the conditions of his receiving postpetition interest. In relevant part it reads as follows:

> "(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, . . . and

> is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim. . . .
>
> "(b) To the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose."

In subsection (a) of this provision the creditor's "interest in property" obviously means his security interest without taking account of his right to immediate possession of the collateral on default. If the latter were included, the "value of such creditor's interest" would increase, and the proportions of the claim that are secured and unsecured would alter, as the stay continues—since the value of the entitlement to use the collateral from the date of bankruptcy would rise with the passage of time. No one suggests this was intended. The phrase "value of such creditor's interest" in § 506(a) means "the value of the collateral." H. R. Rep. No. 95–595, pp. 181, 356 (1977); see also S. Rep. No. 95–989, p. 68 (1978). We think the phrase "value of such entity's interest" in § 361(1) and (2), when applied to secured creditors, means the same.

Even more important for our purposes than § 506's use of terminology is its substantive effect of denying undersecured creditors postpetition interest on their claims—just as it denies *over*secured creditors postpetition interest to the extent that such interest, when added to the principal amount of the claim, will exceed the value of the collateral. Section 506(b) provides that "*[t]o the extent that* an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim." (Emphasis added.) Since this provision permits postpetition interest to be paid only out of the "security cushion," the undersecured creditor,

who has no such cushion, falls within the general rule disallowing postpetition interest. See 11 U. S. C. § 502(b)(2). If the Code had meant to give the undersecured creditor, who is thus denied interest on his *claim*, interest on the value of his *collateral*, surely this is where that disposition would have been set forth, and not obscured within the "adequate protection" provision of § 362(d)(1). Instead of the intricate phraseology set forth above, § 506(b) would simply have said that the secured creditor is entitled to interest "on his allowed claim, or on the value of the property securing his allowed claim, whichever is lesser." Petitioner's interpretation of § 362(d)(1) must be regarded as contradicting the carefully drawn disposition of § 506(b).

Petitioner seeks to avoid this conclusion by characterizing § 506(b) as merely an alternative method for compensating oversecured creditors, which does not imply that no compensation is available to undersecured creditors. This theory of duplicate protection for oversecured creditors is implausible even in the abstract, but even more so in light of the historical principles of bankruptcy law. Section 506(b)'s denial of postpetition interest to undersecured creditors merely codified pre-Code bankruptcy law, in which that denial was part of the conscious allocation of reorganization benefits and losses between undersecured and unsecured creditors. "To allow a secured creditor interest where his security was worth less than the value of his debt was thought to be inequitable to unsecured creditors." *Vanston Bondholders Protective Committee* v. *Green*, 329 U. S. 156, 164 (1946). It was considered unfair to allow an undersecured creditor to recover interest from the estate's unencumbered assets before unsecured creditors had recovered any principal. See *id.*, at 164, 166; *Ticonic Nat. Bank* v. *Sprague*, 303 U. S. 406, 412 (1938). We think it unlikely that § 506(b) codified the pre-Code rule with the intent, not of achieving the principal purpose and function of that rule, but of providing oversecured creditors an alternative method of compensation.

Moreover, it is incomprehensible why Congress would want to favor undersecured creditors with interest if they move for it under § 362(d)(1) at the inception of the reorganization process—thereby probably pushing the estate into liquidation—but not if they forbear and seek it only at the completion of the reorganization.

Second, petitioner's interpretation of § 362(d)(1) is structurally inconsistent with 11 U. S. C. § 552. Section 552(a) states the general rule that a prepetition security interest does not reach property acquired by the estate or debtor postpetition. Section 552(b) sets forth an exception, allowing postpetition "proceeds, product, offspring, rents, or profits" of the collateral to be covered only if the security agreement expressly provides for an interest in such property, and the interest has been perfected under "applicable nonbankruptcy law." See, *e. g.*, *In re Casbeer*, 793 F. 2d 1436, 1442–1444 (CA5 1986); *In re Johnson*, 62 B. R. 24, 28–30 (CA9 Bkrtcy. App. Panel 1986); cf. *Butner* v. *United States*, 440 U. S. 48, 54–56 (1979) (same rule under former Bankruptcy Act). Section 552(b) therefore makes possession of a perfected security interest in postpetition rents or profits from collateral a condition of having them applied to satisfying the claim of the secured creditor ahead of the claims of unsecured creditors. Under petitioner's interpretation, however, the undersecured creditor who lacks such a perfected security interest in effect achieves the same result by demanding the "use value" of his collateral under § 362. It is true that § 506(b) gives the *over*secured creditor, despite lack of compliance with the conditions of § 552, a similar priority over unsecured creditors; but that does not compromise the principle of § 552, since the interest payments come only out of the "cushion" in which the oversecured creditor *does have* a perfected security interest.

Third, petitioner's interpretation of § 362(d)(1) makes nonsense of § 362(d)(2). On petitioner's theory, the undersecured creditor's inability to take immediate possession of

his collateral is always "cause" for conditioning the stay (upon the payment of market rate interest) under § 362(d)(1), since there is, within the meaning of that paragraph, "lack of adequate protection of an interest in property." But § 362(d)(2) expressly provides a different standard for relief from a stay "of an act against property," which of course includes taking possession of collateral. It provides that the court shall grant relief "if . . . (A) the debtor does not have an equity in such property [*i. e.*, the creditor is undersecured]; *and* (B) such property is not necessary to an effective reorganization." (Emphasis added.) By applying the "adequate protection of an interest in property" provision of § 362(d)(1) to the alleged "interest" in the earning power of collateral, petitioner creates the strange consequence that § 362 entitles the secured creditor to relief from the stay (1) if he is undersecured (and thus not eligible for interest under § 506(b)), *or* (2) if he is undersecured *and* his collateral "is not necessary to an effective reorganization." This renders § 362(d)(2) a practical nullity and a theoretical absurdity. If § 362(d)(1) is interpreted in this fashion, an undersecured creditor would seek relief under § 362(d)(2) only if his collateral was not depreciating (or it was being compensated for depreciation) and he was receiving market rate interest on his collateral, but nonetheless wanted to foreclose. Petitioner offers no reason why Congress would want to provide relief for such an obstreperous and thoroughly unharmed creditor.

Section 362(d)(2) also belies petitioner's contention that undersecured creditors will face inordinate and extortionate delay if they are denied compensation for interest lost during the stay as part of "adequate protection" under § 362(d)(1). Once the movant under § 362(d)(2) establishes that he is an undersecured creditor, it is the burden of the *debtor* to establish that the collateral at issue is "necessary to an effective reorganization." See § 362(g). What this requires is not merely a showing that if there is conceivably to be an effective reorganization, this property will be needed for it; but

that the property is essential for an effective reorganization *that is in prospect.* This means, as many lower courts, including the en banc court in this case, have properly said, that there must be "a reasonable possibility of a successful reorganization within a reasonable time." 808 F. 2d, at 370–371, and nn. 12–13, and cases cited therein. The cases are numerous in which § 362(d)(2) relief has been provided within less than a year from the filing of the bankruptcy petition.[1] And while the bankruptcy courts demand less detailed showings during the four months in which the debtor is given the exclusive right to put together a plan, see 11 U. S. C. §§ 1121(b), (c)(2), even within that period lack of any realistic prospect of effective reorganization will require § 362(d)(2) relief.[2]

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[1] See, *e. g.*, *In re Findley*, 76 B. R. 547, 555 (Bkrtcy. Ct. ND Miss. 1987) (6½ months); *In re Efcor, Inc.*, 74 B. R. 837, 843–845 (Bkrtcy. Ct. MD Pa. 1987) (4½ months); *In re Belton Inns, Inc.*, 71 B. R. 811, 818 (Bkrtcy. Ct. SD Iowa 1987) (1 year); *In re Louden*, 69 B. R. 723, 725–726 (Bkrtcy. Ct. ED Mo. 1987) (10 months); *In re Playa Development Corp.*, 68 B. R. 549, 556 (Bkrtcy. Ct. WD Tex. 1986) (7½ months); *In re Cablehouse, Ltd.*, 68 B. R. 309, 313 (Bkrtcy. Ct. SD Ohio 1986) (11½ months); *In re Pacific Tuna Corp.*, 48 B. R. 74, 78 (Bkrtcy. Ct. WD Tex. 1985) (9 months); *In re Development, Inc.*, 36 B. R. 998, 1005–1006 (Bkrtcy. Ct. Haw. 1984) (6 months); *In re Boca Development Associates*, 21 B. R. 624, 630 (Bkrtcy. Ct. SDNY 1982) (7½ months); *In re Sundale Associates, Ltd.*, 11 B. R. 978, 980–981 (Bkrtcy. Ct. SD Fla. 1981) (5 months); *In re Clark Technical Associates, Ltd.*, 9 B. R. 738, 740–741 (Bkrtcy. Ct. Conn. 1981) (9 months).

[2] See, *e. g.*, *In re Anderson Oaks (Phase I) Limited Partnership*, 77 B. R. 108, 109, 110–113 (Bkrtcy. Ct. WD Tex. 1987) ("immediately after the bankruptcy filings"); *In re New American Food Concepts, Inc.*, 70 B. R. 254, 262 (Bkrtcy. Ct. ND Ohio 1987) (3 months); *In re 6200 Ridge, Inc.*, 69 B. R. 837, 843–844 (Bkrtcy. Ct. ED Pa. 1987) (3 months); *In re Park Timbers, Inc.*, 58 B. R. 647, 651 (Bkrtcy. Ct. Del. 1985) (2 months); *In re Bellina's Restaurants II, Inc.*, 52 B. R. 509, 512 (Bkrtcy. Ct. SD Fla. 1985) (1 month); *In re Anchorage Boat Sales, Inc.*, 4 B. R. 635, 641 (Bkrtcy. Ct. EDNY 1980) (4 months); *In re Terra Mar Associates*, 3 B. R. 462, 466 (Bkrtcy. Ct. Conn. 1980) (2 months).

III

A

Petitioner contends that denying it compensation under § 362(d)(1) is inconsistent with sections of the Code other than those just discussed. Petitioner principally relies on the phrase "indubitable equivalent" in § 361(3), which also appears in 11 U. S. C. § 1129(b)(2)(A)(iii). Petitioner contends that in the latter context, which sets forth the standards for confirming a reorganization plan, the phrase has developed a well-settled meaning connoting the right of a secured creditor to receive present value of his security—thus requiring interest if the claim is to be paid over time. It is true that under § 1129(b) a secured claimant has a right to receive under a plan the present value of his collateral. This entitlement arises, however, not from the phrase "indubitable equivalent" in § 1129(b)(2)(A)(iii), but from the provision of § 1129(b)(2)(A)(i)(II) that guarantees the secured creditor "deferred cash payments . . . of a value, *as of the effective date of the plan*, of at least the value of such [secured claimant's] interest in the estate's interest in such property." (Emphasis added.) Under this formulation, even though the undersecured creditor's "interest" is regarded (properly) as solely the value of the collateral, he must be rendered payments that assure him that value *as of the effective date of the plan*. In § 361(3), by contrast, the relief pending the stay need only be such "*as will result in the realization* . . . of the indubitable equivalent" of the collateral. (Emphasis added.) It is obvious (since §§ 361 and 362(d)(1) do not entitle the secured creditor to immediate payment of the principal of his collateral) that this "realization" is to "result" not at once, but only upon completion of the reorganization. It is *then* that he must be assured "realization . . . of the indubitable equivalent" of his collateral. To put the point differently: similarity of outcome between § 361(3) and § 1129 would be demanded only if the former read "such other relief . . . as

will give such entity, *as of the date of the relief*, the indubitable equivalent of such entity's interest in such property."

Nor is there merit in petitioner's suggestion that "indubitable equivalent" in § 361(3) connotes reimbursement for the use value of collateral because the phrase is derived from *In re Murel Holding Corp.*, 75 F. 2d 941 (CA2 1935), where it bore that meaning. *Murel* involved a proposed reorganization plan that gave the secured creditor interest on his collateral for 10 years, with full payment of the secured principal due at the end of that term; the plan made no provision, however, for amortization of principal or maintenance of the collateral's value during the term. In rejecting the plan, *Murel* used the words "indubitable equivalence" with specific reference not to interest (which was assured), but to the jeopardized principal of the loan:

> "Interest is indeed the common measure of the difference [between payment now and payment 10 years hence], but a creditor who fears the safety of his principal will scarcely be content with that; he wishes to get his money or at least the property. We see no reason to suppose that the statute was intended to deprive him of that in the interest of junior holders, unless by a substitute of the most indubitable equivalence." *Id.*, at 942.

Of course *Murel*, like § 1129, proceeds from the premise that in the confirmation context the secured creditor is entitled to present value. But no more from *Murel* than from § 1129 can it be inferred that a similar requirement exists as of the time of the bankruptcy stay. The reorganized debtor is supposed to stand on his own two feet. The debtor in process of reorganization, by contrast, is given many temporary protections against the normal operation of the law.

Petitioner also contends that the Code embodies a principle that secured creditors do not bear the costs of reorganization. It derives this from the rule that general administrative expenses do not have priority over secured claims. See §§ 506(c), 507(a). But the general principle does not follow

from the particular rule. That secured creditors do not bear one kind of reorganization cost hardly means that they bear none of them. The Code rule on administrative expenses merely continues pre-Code law. But it was also pre-Code law that undersecured creditors were not entitled to postpetition interest as compensation for the delay of reorganization. See *supra*, at 373; see also *infra*, at 381. Congress could hardly have understood that the readoption of the rule on administrative expenses would work a change in the rule on postpetition interest, which it also readopted.

Finally, petitioner contends that failure to interpret § 362 (d)(1) to require compensation of undersecured creditors for delay will create an inconsistency in the Code in the (admittedly rare) case when the debtor proves solvent. When that occurs, 11 U. S. C. § 726(a)(5) provides that postpetition interest is allowed on unsecured claims. Petitioner contends it would be absurd to allow postpetition interest on unsecured claims but not on the secured portion of undersecured creditors' claims. It would be disingenuous to deny that this is an apparent anomaly, but it will occur so rarely that it is more likely the product of inadvertence than are the blatant inconsistencies petitioner's interpretation would produce. Its inequitable effects, moreover, are entirely avoidable, since an undersecured creditor is entitled to "surrender or waive his security and prove his entire claim as an unsecured one." *United States Nat. Bank* v. *Chase Nat. Bank*, 331 U. S. 28, 34 (1947). Section 726(a)(5) therefore requires no more than that undersecured creditors receive postpetition interest from a solvent debtor on equal terms with unsecured creditors rather than ahead of them—which, where the debtor is solvent, involves no hardship.

B

Petitioner contends that its interpretation is supported by the legislative history of §§ 361 and 362(d)(1), relying almost entirely on statements that "[s]ecured creditors should not

be deprived of the benefit of their bargain." H. R. Rep. No. 95–595, at 339; S. Rep. No. 95–989, at 53. Such generalizations are inadequate to overcome the plain textual indication in §§ 506 and 362(d)(2) of the Code that Congress did not wish the undersecured creditor to receive interest on his collateral during the term of the stay. If it is at all relevant, the legislative history tends to subvert rather than support petitioner's thesis, since it contains not a hint that § 362(d)(1) entitles the undersecured creditor to postpetition interest. Such a major change in the existing rules would not likely have been made without specific provision in the text of the statute, cf. *Kelly* v. *Robinson*, 479 U. S. 36, 47 (1986); it is most improbable that it would have been made without even any mention in the legislative history.

Petitioner makes another argument based upon what the legislative history does *not* contain. It contends that the pre-Code law gave the undersecured creditor relief from the automatic stay by permitting him to foreclose; and that Congress would not have withdrawn this entitlement to relief without any indication of intent to do so in the legislative history, unless it was providing an adequate substitute, to wit, interest on the collateral during the stay.

The premise of this argument is flawed. As petitioner itself concedes, Brief for Petitioner 20, the undersecured creditor had no absolute entitlement to foreclosure in a Chapter X or XII case; he could not foreclose if there was a reasonable prospect for a successful rehabilitation within a reasonable time. See, *e. g.*, *In re Yale Express System, Inc.*, 384 F. 2d 990, 991–992 (CA2 1967) (Chapter X); *In re Nevada Towers Associates*, 14 Collier Bankr. Cas. (MB) 146, 151–156 (Bkrtcy. Ct. SDNY 1977) (Chapter XII); *In re Consolidated Motor Inns*, 6 Collier Bankr. Cas. (MB) 18, 31–32 (Bkrtcy. Ct. ND Ga. 1975) (same). Thus, even assuming petitioner is correct that the undersecured creditor had an absolute entitlement to relief under Chapter XI, Congress would have been faced with the choice between adopting the rule from

Chapters X and XII or the asserted alternative rule from Chapter XI, because Chapter 11 of the current Code "replaces chapters X, XI and XII of the Bankruptcy Act" with a "single chapter for all business reorganizations." S. Rep. No. 95–989, at 9; see also H. R. Rep. No. 95–595, at 223–224. We think § 362(d)(2) indicates that Congress adopted the approach of Chapters X and XII. In any event, as far as the silence of the legislative history on the point is concerned, that would be no more strange with respect to alteration of the asserted Chapter XI rule than it would be with respect to alteration of the Chapters X and XII rule.

Petitioner's argument is further weakened by the fact that it is far from clear that there was a distinctive Chapter XI rule of absolute entitlement to foreclosure. At least one leading commentator concluded that "a Chapter XI court's power to stay lien enforcement is as broad as that of a Chapter X or XII court and that the automatic stay rules properly make no distinctions between the Chapters." Countryman, Real Estate Liens in Business Rehabilitation Cases, 50 Am. Bankr. L. J. 303, 315 (1976). Petitioner cites dicta in some Chapter XI cases suggesting that the undersecured creditor was automatically entitled to relief from the stay, but the courts in those cases uniformly found in addition that reorganization was not sufficiently likely or was being unduly delayed. See, *e. g.*, *In re Bric of America, Inc.*, 4 Collier Bankr. Cas. (MB) 34, 39–40 (Bkrtcy. Ct. MD Fla. 1975); *In re O. K. Motels*, 1 Collier Bankr. Cas. (MB) 416, 419–420 (Bkrtcy. Ct. MD Fla. 1974). Moreover, other Chapter XI cases held undersecured creditors not entitled to foreclosure under reasoning very similar to that used in Chapters X and XII cases. See *In re Coolspring Estates, Inc.*, 12 Collier Bankr. Cas. (MB) 55, 60–61 (Bkrtcy. Ct. ND Ind. 1977); *In re The Royal Scot, Ltd.*, 2 Bankr. Ct. Dec. (CRR) 374, 376–377 (Bkrtcy. Ct. WD Mich. 1976); *In re Mesker Steel, Inc.*, 1 Bankr. Ct. Dec. (CRR) 235, 236–237 (Bkrtcy. Ct. SD Ind. 1974). The at best divided authority under Chapter XI re-

moves all cause for wonder that the alleged departure from it should not have been commented upon in the legislative history.

The Fifth Circuit correctly held that the undersecured petitioner is not entitled to interest on its collateral during the stay to assure adequate protection under 11 U. S. C. § 362(d)(1). Petitioner has never sought relief from the stay under § 362(d)(2) or on any ground other than lack of adequate protection. Accordingly, the judgment of the Fifth Circuit is

Affirmed.

VIRGINIA *v.* AMERICAN BOOKSELLERS ASSOCIATION, INC., ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 86–1034. Argued November 4, 1987—Decided January 25, 1988

A 1985 amendment to a Virginia statute makes it unlawful for any person "to knowingly display for commercial purposes in a manner whereby juveniles may examine and peruse" certain visual or written sexual or sadomasochistic material that is harmful to juveniles. What is "harmful to juveniles" is defined elsewhere in the statute. Plaintiffs, a number of booksellers' organizations and two Virginia non-"adults only," general-purpose bookstores (appellees here), filed suit in Federal District Court under 42 U. S. C. § 1983, alleging that the amendment is facially violative of the First Amendment in that it significantly and unnecessarily burdens the expressive rights of adults because of the economically devastating and extremely restrictive measures booksellers must adopt to comply; is overbroad in that it restricts access by mature juveniles to works that are "harmful" only to younger children; and is unconstitutionally vague because it is impossible to determine what standard should be used in deciding whether a work is appropriate for juveniles of different ages and levels of maturity. At the trial, the owners of the bookstores introduced as exhibits 16 general-subject books they believed to be covered by the amendment, and testified that the law might apply to as much as one-half of their inventory. However, on cross-examination, they admitted their unfamiliarity with the portion of the law defining "harmful to juveniles." Nevertheless, upon finding, *inter alia*, that the amendment would cover between 5 and 25 percent of a typical bookseller's inventory, the court held the amendment unconstitutional and permanently enjoined its enforcement. The Court of Appeals affirmed. Although critical of the evidentiary basis for the determination, the court neither accepted nor rejected the District Court's finding as to the statute's scope. However, the court did declare that booksellers would face "significant" difficulty in attempting to comply. In so ruling, the court rejected the State's suggestion that a bookseller could avoid prosecution by merely tagging offensive materials or placing them behind "blinder" racks. The court also questioned whether treating all juveniles identically was constitutional, but did not determine the issue.

Held:

1. Plaintiffs had standing to bring suit. The "injury in fact" standing requirement is met here, since the amendment is aimed directly at plaintiffs, who, if their interpretation is correct, will have to take significant and costly compliance measures or risk criminal prosecution. The usual rule that a party may assert only a violation of its own rights must give way to the exception allowing the assertion of the free expression rights of others, since plaintiffs have alleged an infringement of the First Amendment rights of bookbuyers. The pre-enforcement nature of the suit is irrelevant, since plaintiffs have alleged an actual and well-founded fear that the statute will be enforced against them, and there is no reason to assume otherwise. Indeed, the statute's alleged danger is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution. Pp. 392–393.

2. In light of the case's unique factual and procedural setting, this Court will not attempt to decide the constitutional issues presented, but instead certifies two questions of statutory interpretation to the Virginia Supreme Court, answers to which will substantially aid this Court's review and may determine the case entirely. Pp. 393–398.

(a) Under the unusual circumstances of the case, where the amendment's constitutionality turns upon the way in which it is read, but where none of the conflicting interpretations are reliable, and where the State Attorney General apparently is willing to concede the case if the statute is not narrowly interpreted, it is essential that this Court have the benefit of the Virginia Supreme Court's authoritative answer to the certified question whether any of the books introduced by plaintiffs as exhibits below fall within the statute's scope, and what general standard should be used to determine the statute's reach in light of juveniles' differing ages and levels of maturity. The Attorney General's interpretation that the statute covers only a very few "borderline" obscene works and none of plaintiffs' exhibits cannot be accepted as authoritative, since the Attorney General does not bind the state courts or local law enforcement authorities. Moreover, the District Court's holding that the law applies to up to a quarter of a typical bookstore's inventory is not supported by reliable evidence, since the bookstore owners who testified were unfamiliar with the statutory definition of "harmful to minors." Nor can the Court of Appeals' construction that the amendment would confront booksellers with a "substantial" compliance problem be relied upon, since, although it criticized the basis of the District Court's holding, the Court of Appeals gave no alternative basis for its own determination. Pp. 393–396.

(b) The question whether, as asserted by the State at oral argument, the amendment is satisfied if a bookseller, as a matter of policy,

prevents a juvenile observed reviewing covered works from continuing to do so, even if the restricted materials are not segregated from nonobjectionable works, and, if not, whether the statute would be complied with if the store's policy were announced or otherwise manifested to the public, is also certified, since an affirmative answer to the first alternative would mean, while a positive response to the second alternative might mean, that the burden to the bookseller, and therefore to the adult bookbuying public, is significantly less than that feared and asserted by plaintiffs. There is some advantage and no cost, either in terms of the First Amendment chilling effect or unnecessary delay, in certifying this question, which proffers a narrowing construction that is neither inevitable nor impossible, in light of the unusual circumstances of this case; *i. e.*, that another question is already being certified, that enforcement of the statute will remain enjoined throughout the certification process, and that no state court has ever had the opportunity to interpret the pertinent statutory language. Pp. 396–397.

802 F. 2d 691, questions certified.

BRENNAN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, MARSHALL, BLACKMUN, O'CONNOR, and SCALIA, JJ., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 398.

Richard B. Smith, Assistant Attorney General of Virginia, argued the cause for appellant. With him on the briefs were *Mary Sue Terry*, Attorney General, and *Mark R. Davis*, Assistant Attorney General.

Paul M. Bator, argued the cause for appellees. With him on the brief were *Kenneth S. Geller*, *Mark I. Levy*, *Michael A. Bamberger*, *David C. Burger*, *Maxwell Lillienstein*, and *Burton Joseph*.*

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*Briefs of *amici curiae* urging reversal were filed for the city of Minneapolis by *Robert J. Alfton* and *David M. Gross;* for the Institute for Youth Advocacy by *Gregory A. Loken;* and for the National Legal Foundation by *Paul S. McConnell* and *Robert K. Skolrood.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Charles S. Sims*, *John A. Powell*, and *Steven R. Shapiro;* for the Freedom to Read Foundation by *Bruce J. Ennis* and *David W. Ogden;* and for Jean M. Auel et al. by *R. Bruce Rich.*

JUSTICE BRENNAN delivered the opinion of the Court.

The courts below declared unconstitutional the following Virginia statute: "It shall be unlawful for any person . . . to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse" visual or written material that "depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles." Va. Code § 18.2–391(a) (Supp. 1987). The unique factual and procedural setting of this case leads us to conclude that an authoritative construction of the Virginia statute by the Virginia Supreme Court would substantially aid our review of this constitutional holding, and might well determine the case entirely. Accordingly, we certify two questions to the Virginia Supreme Court.[1]

I

In 1968, this Court held consitutional a state prohibition on the sale to those under 17 of materials deemed "harmful to juveniles." *Ginsberg* v. *New York*, 390 U. S. 629, 643

[1] Rule 5:42(a) of the Rules of the Virginia Supreme Court states:

"*Power to Answer.*—The [Virginia] Supreme Court may in its discretion answer questions of law certified to it by the Supreme Court of the United States, a United States court of appeals for any circuit, a United States district court, or the highest appellate court of any state or the District of Columbia. Such answer may be furnished, when requested by the certifying court, if a question of Virginia law is determinative in any proceeding pending before the certifying court and it appears there is no controlling precedent on point in the decisions of the Supreme Court or the Court of Appeals of Virginia."

This opinion, along with a statement to be appended by the Clerk of the Court setting out the names, addresses, and telephone numbers of counsel for the parties and the names of each of the parties involved, shall constitute the certification order. Va. Sup. Ct. Rule 5:42(d). The Clerk of the Court shall also transmit to the Virginia Supreme Court the record in this case, including plaintiffs' exhibits and the trial transcript. Appellant shall bear the fees and costs on certification in the Virginia Supreme Court. Va. Sup. Ct. Rule 5:42(g). Such fees and costs shall be taxable items pursuant to this Court's Rule 50. Virginia's certification procedure became effective on April 1, 1987, and hence was unavailable to the courts below.

(1968). The next year, Virginia enacted a similar statute. The Virginia Code's current definition of "harmful to juveniles" is a modification of the *Miller* definition of obscenity, adapted for juveniles. *Miller* v. *California*, 413 U. S. 15, 24 (1973). The statute reads in relevant part:

> "'Harmful to Juveniles' means that quality of any description or presentation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it (a) predominately appeals to the prurient, shameful or morbid interest of juveniles, (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for juveniles, and (c) is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles." Va. Code § 18.2–390(6) (1982).

In 1985, Virginia amended its law to make it also a crime "to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse" the aforementioned materials, even if these materials are not actually sold to any juvenile.[2]

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[2] The law, with the 1985 amendment italicized, reads as follows:

"Definitions.—As used in this article:

"(1) 'Juvenile' means a person less than eighteen years of age.

[Subsections (2–5) define "Nudity," "Sexual conduct," "Sexual excitement," and "Sadomasochistic abuse," respectively.]

"(6) 'Harmful to Juveniles' means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it (a) predominately appeals to the prurient, shameful or morbid interest of juveniles, (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for juveniles, and (c) is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles.

"(7) 'Knowingly' means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both (a) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and (b) the age of the juvenile, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a rea-

Plaintiffs made a facial challenge to the 1985 amendment in the United States District Court for the Eastern District of Virginia.[3] They asserted that the 1985 amendment was fundamentally different from the prior statute in that it burdens the First Amendment rights of adults, as to whom at least some of the covered works are not obscene. They argued that, while the *sale* provision does not affect adult access to covered works in any significant way, as the Court held in *Ginsberg*, *supra*, at 634–635, the 1985 amendment, governing the *display* of such works to minors, substantially restricts access to adults because of the economically devastating and

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sonable bona fide attempt to ascertain the true age of such juvenile." Va. Code § 18.2–390 (1982).

Va. Code § 18.2–391 (Supp. 1987) reads:

"Unlawful acts.—(a) It shall be unlawful for any person knowingly to sell or loan to a juvenile, *or to knowingly display for commercial purpose in a manner whereby juveniles may examine or peruse:*

"(1) Any picture, photography, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles, or

"(2) Any book, pamphlet, magazine, printed matter however reproduced or sound recording which contains any matter enumerated in subdivision (1) of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which taken as a whole, is harmful to juveniles.

. . . . . .

"(e) Violation of any provision hereof shall constitute a Class 1 misdemeanor."

[3] Plaintiffs below included a number of organizations with memberships consisting of national and Virginia booksellers, two Virginia bookstores, and a Virginia adult and her juvenile child. The District Court dismissed the parent and child for failure to allege potential prosecution under the 1985 amendment, a potential economic injury flowing therefrom, or "anything more than an abstract interest in the availability of reading materials in bookstores, an interest which is no different from the interests of all other local citizens who patronize bookstores." *American Booksellers Assn.* v. *Strobel*, 617 F. Supp. 699, 704 (1985). The remaining plaintiffs are the appellees here.

extremely restrictive measures booksellers must adopt to comply. Specifically, they argued, compliance requires a bookseller to: (1) create an "adults only" section of the store; (2) place the covered works behind the counter (which would require a bookbuyer to request specially a work); (3) decline to carry the materials in question; or (4) bar juveniles from the store.[4] Plaintiffs maintained that because bookbuyers generally make their selections by browsing through displayed books, and because adults would be reluctant to enter an "adults only" store or section of a store, the statute effectively restricts the entire population's access to books that fall within its purview. In effect, argued plaintiffs, the law reduces the adult population to reading and viewing only works suitable for children, something this Court has repeatedly held is prohibited by the First Amendment. *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 73–74 (1983); *Butler* v. *Michigan*, 352 U. S. 380, 383–384 (1957). Consequently, they asserted, the law must undergo First Amendment scrutiny. Applying that scrutiny, plaintiffs reasoned that the law is unconstitutional because the State's interest in restricting the display of these works is insubstantial and the law does not further this interest by the least restrictive means available. In support of that proposition, plaintiffs argued that the statute criminalizes the mere *display* of covered works, even if there is no evidence that a juvenile would *actually* examine and peruse them.

Plaintiffs also maintained that the law is overbroad in that it restricts access by mature juveniles to works that are "harmful" only to younger children. Finally, the statute is purported to be unconstitutionally vague, in part because it is

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[4]There are a number of different types of booksellers in Virginia. Some are traditional bookstore owners. Others include, for example, grocery store owners, drugstore owners, and airport convenience store owners who have one or more book or magazine racks. The ability of these diverse types of booksellers to utilize the differing methods of compliance varies.

allegedly impossible to determine what standard should be used in deciding whether a work is appropriate for juveniles of different ages and levels of maturity.[5]

Plaintiffs brought suit under 42 U. S. C. § 1983 against the Arlington County Chief of Police. Pursuant to 28 U. S. C. § 2403(b), the Virginia Attorney General intervened. The defendants argued that the 1985 amendment is a necessary corollary to the prior sales restriction, as one without the other is useless. Defendants also challenged plaintiffs' reading of the statute's reach, arguing that it extends only to "borderline obscenity." Further, compliance with the statute may be achieved, they maintained, by placing distinctive tags on the restricted materials, or placing them behind "blinder racks." Therefore, they asserted the statute has no significant "spillover" effect on adults, and any effect there might be is permissible under a "time, place, or manner" test. Even under strict First Amendment scrutiny, they argued, the 1985 amendment is constitutional due to the State's compelling interest in protecting juveniles and the lack of a less restrictive alternative to achieve effectively that interest.

Plaintiffs moved for a preliminary injunction, and defendants moved to dismiss or abstain. At the preliminary injunction hearing, which became a trial on the merits, plaintiffs called three witnesses: two booksellers (the owners of the two plaintiff bookstores) and the general counsel of plaintiff American Booksellers Association. The two booksellers testified that their stores were typical in most respects of non-"adults only" general-subject bookstores in the State. The booksellers introduced as exhibits a total of 16 books that they believed were examples of books the amended statute covered, and testified that the law might apply to as much as

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[5] Plaintiffs argued that these problems do not arise in the context of the original statute, which regulates only the *sale* of certain materials. According to plaintiffs and the Court of Appeals, at the point of *sale* a bookseller can make an individualized determination as to the suitability of a specific item for a specific child. 802 F. 2d 691, 695, n. 7 (CA4 1986).

one half of their inventory. The exhibits were extremely diverse, including classic literature, health texts, poetry, photography, and potboiler novels. Finally, all three witnesses testified as to the steps they believed a bookseller would have to take to conform to the statute, repeating the four options discussed above. On cross-examination, defendants elicited testimony from the bookstore owners that they were unfamiliar with the portion of the law defining "harmful to juveniles." Therefore, defendants submitted that the plaintiffs' witnesses were testifying under a mistaken impression as to the statute's coverage.

The trial court denied defendant's motion to dismiss the case and declined to abstain. On the merits, it held as a factual matter that the statute would cover between 5 and 25 percent of a typical bookseller's inventory. Further, the court agreed with plaintiffs as to the alternatives available to comply with the law, rejecting defendants' suggestion that a bookseller could avoid criminal prosecution by merely tagging the materials or placing them behind "blinder" racks. The court reasoned from this that the 1985 amendment placed significant burdens on adult First Amendment rights by restricting adult access to nonobscene works. It concluded that the 1985 amendment was overbroad, and permanently enjoined its enforcement.

The Court of Appeals for the Fourth Circuit affirmed. 802 F. 2d 691 (1986). While critical of the evidentiary basis for the determination, the court neither accepted nor rejected expressly the District Court's finding as to the scope of the statute. *Id.*, at 696. At the same time, however, the court stated that "[i]t cannot be gainsaid" that book retailers would face significant difficulty attempting to comply with the statute. The Court of Appeals, like the District Court, adopted plaintiffs' theory as to the acceptable modes of compliance with the statute and rejected the Attorney General's alternatives, reasoning that tagging the materials or placing them behind blinder racks would not, as a practical matter, deter

juveniles from examining and perusing the works. The court questioned whether treating all juveniles identically was constitutional, but did not determine the issue.

The State appealed to this Court, alleging a conflict among the Courts of Appeals. See *Upper Midwest Booksellers Assn.* v. *Minneapolis*, 780 F. 2d 1389 (CA8 1985) (holding a similar ordinance constitutional), and *M. S. News Co.* v. *Casado*, 721 F. 2d 1281 (CA10 1983) (same). We noted probable jurisdiction. 479 U. S. 1082 (1987).

II

We first address plaintiffs' standing to bring suit. The State argued before the District Court that plaintiffs lacked standing to bring a pre-enforcement facial challenge, alleging that plaintiffs did not suffer sufficient harm, and what harm they did suffer was economic, not speech related. Further, the State argued that plaintiffs' challenge was premature, having been made before the statute became effective.

To bring a cause of action in federal court requires that plaintiffs establish at an irreducible minimum an injury in fact; that is, there must be some "'threatened or actual injury resulting from the putatively illegal action . . . .'" *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975), quoting *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617 (1973); see also *Association of Data Processing Service Organizations* v. *Camp*, 397 U. S. 150, 151–154 (1970). That requirement is met here, as the law is aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution. See *Craig* v. *Boren*, 429 U. S. 190, 194 (1976); *Doe* v. *Bolton*, 410 U. S. 179, 188 (1973).

Even if an injury in fact is demonstrated, the usual rule is that a party may assert only a violation of its own rights. However, in the First Amendment context, "'[l]itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence

may cause others not before the court to refrain from constitutionally protected speech or expression.'" *Secretary of State of Maryland* v. *J. H. Munson Co.*, 467 U. S. 947, 956–957 (1984), quoting *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612 (1973). This exception applies here, as plaintiffs have alleged an infringement of the First Amendment rights of bookbuyers.[6]

We are not troubled by the pre-enforcement nature of this suit. The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them. Further, the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution.

III

We have concluded that we should not attempt to decide the constitutional issues presented without first having the Virginia Supreme Court's interpretation of key provisions of the statute. Several factors combine in a unique way to counsel that course.

At oral argument the State's attorney[7] conceded that if the statute is read as plaintiffs contend, not only is it unconstitutional but its enforcement *should*, as a normative matter, be enjoined. Indeed, he seemingly conceded that if any of the books introduced as plaintiffs' exhibits below is covered by the statute, plaintiffs should prevail.[8] However,

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[6] The complaint also alleged a violation of plaintiffs' own First Amendment right to display the restricted works, but that claim was not passed on below and is not pressed here.

[7] The term "State's attorney" refers to Mr. Smith, the Assistant Attorney General who argued the case.

[8] After noting that plaintiffs have asserted that the statute covers the broad range of works represented by their exhibits below, the State's attorney said:

"If that range is correct, if they are correct that this amendment involves that material, then we lose the case, and I submit to the Court that we

the State argues that the statute's coverage is much narrower than plaintiffs allege or the courts below found. It contends that the statute covers only a very few "borderline" obscene works, and none of the exhibits introduced by plaintiffs.[9]

There was testimony below that if the coverage of the statute is as narrow as the State argues, it would reach less than a single shelf of a typical bookseller's wares. App. 222. If that is true, methods of compliance exist that are substantially less burdensome than those discussed by the lower courts. For example, as is currently done in one of the plaintiff bookstores, a single shelf containing restricted books can be located within sight of the bookseller. If a juvenile examines or peruses the materials, an employee can prevent his continuing to do so. *Id.*, at 207. This is not to say that the law might not still raise substantial constitutional questions. However, the nature of the First Amendment "spillover" burden to adults would be dramatically altered.

Plaintiffs, pointing to the lower courts' interpretation of the law, paint a strikingly different picture. They see the statute as a broad enactment, potentially applying to a huge number of works. This is not a law, they say, covering only "borderline obscenity," but rather a device expunging from display up to a quarter of the books available to juveniles

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should lose the case, because the Commonwealth of Virginia does not desire to restrict in any way, directly or indirectly, that type of material.

. . . . . .

"I will wager this case on one exhibit, Plaintiff's Exhibit Number 4, The Penguin Book of Love Poetry. *If that book falls within this statute, then we concede the case.* You don't have to look at all of them. Just look at that one book. Or if you want to look at all of them, *the same thing goes for all of them* . . . ." Tr. of Oral Arg. 4, 19, (emphasis added).

[9] We note that in her brief to the Court of Appeals, the Attorney General conceded, or appeared to concede, that one of the exhibits, Hollywood Wives, would be covered. Opening Brief for Appellant Commonwealth of Virginia in Nos. 85–1961(L), 85–1999, pp. 27–28. At oral argument before this Court, that apparent concession was disclaimed. Tr. of Oral Arg. 5.

and, as a practical matter, to adults. The courts below similarly regarded the coverage; for a law, like Virginia's, that applies to up to 25 percent of a typical bookstore's inventory (as the District Court held) or that would confront booksellers with a "substantial problem" of compliance (as the Court of Appeals stated) must extend beyond only the nearly obscene. This broader reading of the statute would raise correspondingly greater First Amendment questions.

This Court rarely reviews a construction of state law agreed upon by the two lower federal courts. *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 499–500 (1985). However, this case presents the rare situation in which we cannot rely on the construction and findings below. There is no reliable evidence in the record supporting the District Court's holding that the statute reaches up to 25 percent of a typical bookstore, since the two bookstore owners who testified were unfamiliar with the statutory definition of "harmful to minors." We cannot tell whether the court's finding was based on an independent determination by the District Judge, as plaintiffs suggest, or the flawed testimony. But even if the holding were based on the former, we cannot discern the evidentiary basis for it. Neither can we rely on the Court of Appeals' construction. That court criticized the basis of the District Court's holding, but gave no alternative basis for its own determination. Given this history we are reluctant to adopt without question the lower courts' interpretation of state law. At the same time, as the Attorney General does not bind the state courts or local law enforcement authorities, we are unable to accept her interpretation of the law as authoritative.

Under these unusual circumstances, where it appears the State will decline to defend a statute if it is read one way and where the nature and substance of plaintiffs' constitutional challenge is drastically altered if the statute is read another way, it is essential that we have the benefit of the law's authoritative construction from the Virginia Supreme Court.

Certification, in contrast to the more cumbersome and (in this context) problematic abstention doctrine, is a method by which we may expeditiously obtain that construction. See *Bellotti* v. *Baird*, 428 U. S. 132 (1976) (remanding with instructions to certify questions pertaining to construction of a state statute that was susceptible to multiple interpretations, one of which would avoid or substantially modify a federal constitutional challenge). Consequently, we shall resort to its certification Rule 5:42 to ask the Virginia Supreme Court whether any of the books introduced by plaintiffs as exhibits below fall within the scope of the amended statute, and how such decisions should take into account juveniles' differing ages and levels of maturity.

We will also certify a second question. At oral argument, in response to a question from the bench, the State's attorney declared that a bookseller will not be subject to criminal prosecution if, as a matter of store policy, the bookseller prevents a juvenile observed reviewing covered works from continuing to do so, even if the restricted materials are not segregated.[10]

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[10] The following colloquy occurred at oral argument:

"QUESTION: Mr. Smith, suppose a bookseller does not segregate books. Would he be able to comply with the Virginia statute by simply saying, whenever I see a juvenile, a person who looks to me like a juvenile, browsing in a book which is a book that I ought to know falls within this statute, I stop that juvenile and ask him to leave the store. That is my store policy.

"*Would that be enough to comply with the statute?*

"MR. SMITH: *Yes sir.*

. . . . .

"QUESTION: . . . I am talking about the language 'display for a commercial purpose in a manner whereby juveniles may examine and peruse.' 'May.'

"MR. SMITH: Because I think—

"QUESTION: 'May' means it is possible for them to do so or they are permitted to do so.

"MR. SMITH: This Court had a case which I have cited in my brief called the Foreign Products Case, and that case said that when used in a statute as this 'May' is used, it can mean might or it can mean reasonable

If this is what the statute means, the burden to the bookseller, and the adult bookbuying public, is significantly less than that feared and asserted by plaintiffs. (Even if the statute means that the bookseller is required to announce or manifest the store's policy, perhaps by appropriate signs in the store or other reasonable measures, the burdens might be less than under plaintiffs' construction.)

It has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be "readily susceptible" to a narrowing construction that would make it constitutional, it will be upheld. *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205 (1975); *Broadrick* v. *Oklahoma*, 413 U. S. 601 (1973). The key to application of this principle is that the statute must be "readily susceptible" to the limitation; we will not rewrite a state law to conform it to constitutional requirements.

It is not necessary in this case, however, to decide whether the statute is readily susceptible of the Attorney General's current interpretation. The situation we confront is unusual. Another question is already being certified, enforcement of the statute will remain enjoined throughout the certification process, and no state court has ever had the opportunity to interpret the pertinent statutory language. In these circumstances, there is some advantage and no cost, either in terms of the First Amendment chilling effect or unnecessary delay, to certifying a proffered narrowing construction that is neither inevitable nor impossible. Thus, we certify this second question.[11]

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certainty or it can mean actual tendency under Virginia law, since it has to be strictly construed against the Commonwealth, *it has to be what you have suggested, and it would qualify.*" Tr. of Oral Arg. 51–52 (emphasis added).

[11] The constitutional issues relating to the display of visual materials (Va. Code § 18.2–391(a)(1) (Supp. 1987)) are potentially different from those relating to the display of written works (§ 18.2–391(a)(2) (Supp. 1987)). However, we believe that answers to the certified questions will substantially aid us in resolving both inquiries.

IV

Pursuant to Rule 5:42 of the Virginia Supreme Court, we respectfully certify to that court the following questions:

1. Does the phrase "harmful to juveniles" as used in Virginia Code §§ 18.2–390 and 18.2–391 (1982 and Supp. 1987), properly construed, encompass any of the books introduced as plaintiffs' exhibits below, and what general standard should be used to determine the statute's reach in light of juveniles' differing ages and levels of maturity?

2. What meaning is to be given to the provision of Virginia Code § 18.2–391(a) (Supp. 1987) making it unlawful "to knowingly display for commerical purpose in a manner whereby juveniles may examine or peruse" certain materials? Specifically, is the provision complied with by a plaintiff bookseller who has a policy of not permitting juveniles to examine and peruse materials covered by the statute and who prohibits such conduct when observed, but otherwise takes no action regarding the display of restricted materials? If not, would the statute be complied with if the store's policy were announced or otherwise manifested to the public?

It is so ordered.

JUSTICE STEVENS, concurring in part and dissenting in part.

A matter as important as the constitutionality of a state statute should not be decided on the basis of an advocate's concession during oral argument in this Court. The Assistant Attorney General was certainly correct when he conceded that a statutory restriction on the commercial display of The Penguin Book of Love Poetry would be unconstitutional, but it is less clear that *none* of the 16 exhibits introduced by the plaintiffs could be subjected to the statutory prohibition. Moreover, the colloquy that is partially quoted *ante*, at 393–394, n. 8, is neither entirely unambiguous nor

equivalent to a formal commitment by the State to dismiss the appeal if the Virginia Supreme Court advises us that one or more of the exhibits is covered by the statute. I would therefore modify the first certified question to ask the state court which, if any, of the plaintiff's exhibits is covered by the statute. Because the arguable literary, artistic, or scientific value of the exhibits varies widely, as does the character of the sexual references in the different books, an answer to the question I would ask would be of great help in understanding the reach of the statute and evaluating its validity. Accordingly, while I am in substantial agreement with what the Court has written, I respectfully dissent from the Court's refusal to ask the question that I have proposed.

TAYLOR *v.* ILLINOIS

CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

No. 86–5963. Argued October 7, 1987—Decided January 25, 1988

Well in advance of petitioner's state-court trial for attempted murder, the prosecutor filed a discovery motion requesting a list of defense witnesses. Petitioner's answer failed to list one Wormley, as did his amended answer, submitted and accepted on the first day of trial, identifying two witnesses who were never called to testify. On the second day of trial, after the prosecution's two principal witnesses had completed their testimony, petitioner's counsel made an oral motion to further amend the discovery answer to include Wormley. Counsel explained that Wormley had probably seen the entire incident that led to the indictment and that, although petitioner had told counsel about Wormley earlier, counsel had been unable to locate Wormley. At a subsequent *voir dire* examination, Wormley testified that he had not been a witness to the incident itself but had earlier seen the victim and his brother carrying guns and threatening petitioner and that he just happened to run into petitioner and warned him to watch out. On cross-examination, Wormley acknowledged that he had first met petitioner over two years after the incident in question and that defense counsel had visited him at his home during the week before the trial began. As a sanction for the failure to identify Wormley in the discovery answer, the trial judge refused to allow Wormley to testify before the jury. The judge explained that petitioner's counsel had committed a blatant and willful violation of the discovery rules and that the judge doubted the veracity of Wormley's testimony. The Illinois Appellate Court affirmed petitioner's conviction.

Held:

1. The Compulsory Process Clause of the Sixth Amendment may, in an appropriate case, be violated by the imposition of a discovery sanction that entirely excludes the testimony of a material defense witness. The Clause is not merely a guarantee that the accused shall have the power to subpoena witnesses, but confers on the accused the fundamental right to present witnesses in his own defense. Pp. 407–409.

2. However, the Compulsory Process Clause does not create an absolute bar to preclusion of the testimony of a defense witness as a sanction for violating a discovery rule. Although a trial court may not ignore the fundamental character of the defendant's right to offer the testimony of witnesses in his favor, the mere invocation of that right cannot automatically and invariably outweigh countervailing public interests. If discov-

ery violations are willful and motivated by a desire to obtain a tactical advantage or to conceal a plan to present fabricated testimony, it would be entirely appropriate to exclude the witnesses' testimony regardless of whether other, less drastic sanctions might be available, adequate, and merited. Pp. 410–416.

3. The exclusion of Wormley's testimony did not constitute constitutional error. Pp. 416–418.

(a) The fact that the *voir dire* examination of Wormley may have adequately protected the prosecution from prejudice resulting from surprise does not render the imposition of the preclusion sanction unnecessarily harsh. The record raises strong inferences that petitioner's counsel was deliberately seeking a tactical advantage in failing to list Wormley as a witness and that "witnesses [were] being found that really weren't there." Thus, the case fits into the category of willful misconduct for which the severe sanction of preclusion is justified in order to protect the integrity of the judicial process. Pp. 416–417.

(b) It is not unfair to hold petitioner responsible for his lawyer's misconduct. The lawyer necessarily has full authority to manage the conduct of the trial, and the client must accept the consequences of the lawyer's trial decisions. Pp. 417–418.

141 Ill. App. 3d 839, 491 N. E. 2d 3, affirmed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, and SCALIA, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 419. BLACKMUN, J., filed a dissenting opinion, *post*, p. 438.

Richard E. Cunningham argued the cause for petitioner. With him on the briefs were *Paul P. Biebel, Jr.*, *Robert P. Isaacson*, and *Emily Eisner*.

Michael Shabat argued the cause for respondent. On the brief were *Neil F. Hartigan*, Attorney General of Illinois, *Jill Wine-Banks*, Deputy Attorney General, *Roma J. Stewart*, Solicitor General, and *Joan G. Fickinger*, Assistant Attorney General.*

JUSTICE STEVENS delivered the opinion of the Court.

As a sanction for failing to identify a defense witness in response to a pretrial discovery request, an Illinois trial

**Solicitor General Fried, Assistant Attorney General Weld, Deputy Solicitor General Bryson, Paul J. Larkin, Jr.*, and *Sidney M. Glazer* filed a brief for the United States as *amicus curiae* urging affirmance.

judge refused to allow the undisclosed witness to testify. The question presented is whether that refusal violated the petitioner's constitutional right to obtain the testimony of favorable witnesses. We hold that such a sanction is not absolutely prohibited by the Compulsory Process Clause of the Sixth Amendment and find no constitutional error on the specific facts of this case.[1]

I

A jury convicted petitioner in 1984 of attempting to murder Jack Bridges in a street fight on the south side of Chicago on August 6, 1981. The conviction was supported by the testimony of Bridges, his brother, and three other witnesses. They described a 20-minute argument between Bridges and a young man named Derrick Travis, and a violent encounter that occurred over an hour later between several friends of Travis, including petitioner, on the one hand, and Bridges, belatedly aided by his brother, on the other. The incident was witnessed by 20 or 30 bystanders. It is undisputed that at least three members of the group which included Travis and petitioner were carrying pipes and clubs that they used to beat Bridges. Prosecution witnesses also testified that petitioner had a gun, that he shot Bridges in the back as he attempted to flee, and that, after Bridges fell, petitioner pointed the gun at Bridges' head but the weapon misfired.

Two sisters, who are friends of petitioner, testified on his behalf. In many respects their version of the incident was consistent with the prosecution's case, but they testified that it was Bridges' brother, rather than petitioner, who possessed a firearm and that he had fired into the group hitting

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[1] The Sixth Amendment provides, in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." This right is applicable in state as well as federal prosecutions. *Washington* v. *Texas*, 388 U. S. 14, 17–19 (1967).

his brother by mistake. No other witnesses testified for the defense.

Well in advance of trial, the prosecutor filed a discovery motion requesting a list of defense witnesses.[2] In his original response, petitioner's attorney identified the two sisters who later testified and two men who did not testify.[3] On the first day of trial, defense counsel was allowed to amend his answer by adding the names of Derrick Travis and a Chicago police officer; neither of them actually testified.

On the second day of trial, after the prosecution's two principal witnesses had completed their testimony, defense counsel made an oral motion to amend his "Answer to Discovery" to include two more witnesses, Alfred Wormley and Pam Berkhalter. In support of the motion, counsel represented that he had just been informed about them and that they had probably seen the "entire incident."[4]

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[2] Illinois Supreme Court Rule 413(d) provides in pertinent part:

"Subject to constitutional limitations and within a reasonable time after the filing of a written motion by the State, defense counsel shall inform the State of any defenses which he intends to make at a hearing or trial and shall furnish the State with the following material and information within his possession or control:

"(i) *the names and last known addresses of persons he intends to call as witnesses* together with their relevant written or recorded statements, including memoranda reporting or summarizing their oral statements, any record of prior criminal convictions known to him . . ." (emphasis added).

[3] These two men, Earl Travis, the brother of Derrick Travis, and Luther Taylor, petitioner's brother, were identified by prosecution witnesses as participants in the street fight.

[4] "During the direct testimony of the witnesses, your Honor, called by the State, I was informed of some additional witnesses which could have and probably did, in fact, see this entire incident. We at this time would ask to amend our Answer to include two additional witnesses.

"THE COURT: Who are they?

"MR. VAN: One is a guy named Alfred Wrdely of which—

"THE DEFENDANT: Excuse me, W-r-d-e-l-y.

"MR. VAN: Whose address I do not have. I'm going to have to see if I can locate him tonight. And Pam Berkhalter." App. 12.

In response to the court's inquiry about defendant's failure to tell him about the two witnesses earlier, counsel acknowledged that defendant had done so, but then represented that he had been unable to locate Wormley.[5] After noting that the witnesses' names could have been supplied even if their addresses were unknown, the trial judge directed counsel to bring them in the next day, at which time he would decide whether they could testify. The judge indicated that he was concerned about the possibility "that witnesses are being found that really weren't there."[6]

The next morning Wormley appeared in court with defense counsel.[7] After further colloquy about the consequences of a violation of discovery rules, counsel was permitted to make an offer of proof in the form of Wormley's testimony outside the presence of the jury. It developed that Wormley had not been a witness to the incident itself. He testified that prior to the incident he saw Jack Bridges and his brother with two guns in a blanket, that he heard them say "they were after Ray [petitioner] and the other people," and that on his way home he "happened to run into Ray and them" and warned them "to watch out because they got

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[5] "THE COURT: Yeah, but the defendant was there, and the defendant is now telling you Pam Berkhalter, and he's now telling you Alfred Wrdely. Why didn't he tell you that sometime ago? He's got an obligation to tell you.

"MR. VAN: That is correct, Judge. He, in fact, told me about Alfred sometime ago. The problem was that he could not locate Alfred." *Id.*, at 12–13.

[6] "There's all sorts of people on the scene, and all of these people should have been disclosed before.

"When you bring up these witnesses at the very last moment, there's always the allegation and the thought process that witnesses are being found that really weren't there. And it's a problem in these types of cases, and it should be—should have been put on that sheet a long time ago.

"At any rate, I'll worry about it tomorrow." *Id.*, at 13–14.

[7] The record does not explain why Pam Berkhalter did not appear.

weapons."[8] On cross-examination, Wormley acknowledged that he had first met defendant "about four months ago" (*i. e.*, over two years after the incident). He also acknowledged that defense counsel had visited him at his home on the Wednesday of the week before the trial began. Thus, his testimony rather dramatically contradicted defense counsel's representations to the trial court.

After hearing Wormley testify, the trial judge concluded that the appropriate sanction for the discovery violation was to exclude his testimony. The judge explained:

> "THE COURT: All right, I am going to deny Wormley an opportunity to testify here. He is not going to testify. I find this is a blatent *[sic]* violation of the discovery rules, willful violation of the rules. I also feel that defense attorneys have been violating discovery in this courtroom in the last three or four cases blatantly and I am going to put a stop to it and this is one way to do so.
>
> "Further, for whatever value it is, because this is a jury trial, I have a great deal of doubt in my mind as to the veracity of this young man that testified as to whether he was an eyewitness on the scene, sees guns that are wrapped up. He doesn't know Ray but he stops Ray.
>
> "At any rate, Mr. Wormley is not going to testify, be a witness in this courtroom." App. 28.

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[8] "Q. What, if anything did you learn by standing there in the crowd?

"A. Well, Jack had a blanket. It was two pistols in there and he gave it to—

"Q. And then what, if anything, did they say at that time, if you can recall?

"A. Well, they were saying what they were going to do to the people. Say they were after Ray and the other people.

"Q. What, if anything, did you do at that time?

"A. At that time I left. I was on my way home and I happened to run into Ray and them and so I told them what was happening and to watch out because they got weapons." *Id.*, at 19.

The Illinois Appellate Court affirmed petitioner's conviction. 141 Ill. App. 3d 839, 491 N. E. 2d 3 (1986). It held that when "discovery rules are violated, the trial judge may exclude the evidence which the violating party wishes to introduce" and that "[t]he decision of the severity of the sanction to impose on a party who violates discovery rules rests within the sound discretion of the trial court." The court concluded that in this case "the trial court was within its discretion in refusing to allow the additional witnesses to testify." *Id.*, at 844–845, 491 N. E. 2d, at 7. The Illinois Supreme Court denied leave to appeal and we granted the petition for certiorari, 479 U. S. 1063 (1987).

In this Court petitioner makes two arguments. He first contends that the Sixth Amendment bars a court from ever ordering the preclusion of defense evidence as a sanction for violating a discovery rule. Alternatively, he contends that even if the right to present witnesses is not absolute, on the facts of this case the preclusion of Wormley's testimony was constitutional error. Before addressing these contentions, we consider the State's argument that the Compulsory Process Clause of the Sixth Amendment is merely a guarantee that the accused shall have the power to subpoena witnesses and simply does not apply to rulings on the admissibility of evidence.[9]

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[9]The State also argues that we should decline to exercise jurisdiction over petitioner's Sixth Amendment claim because it was inadequately presented in the state court. As respondent points out, petitioner did not specifically articulate his claim as based on the Compulsory Process Clause until he filed a petition for rehearing in the Illinois Appellate Court. Moreover, at trial petitioner merely argued that the trial court erred by not letting his witness testify. On appeal, however, petitioner asserted that the error was constitutional: "The trial judge abused his discretion and denied [petitioner] due process by excluding a material defense witness from testifying as a sanction for a discovery violation." Brief and Argument For Appellant in No. 84–1073 (App. Ct. Ill.), p. 28. Although petitioner expressly asserted only a due process violation, his reliance on the Sixth Amendment was clear. He cited and relied upon, through a quotation from an Illinois Appellate Court decision, two of our Compul-

II

In the State's view, no Compulsory Process Clause concerns are even raised by authorizing preclusion as a discovery sanction, or by the application of the Illinois rule in this case. The State's argument is supported by the plain language of the Clause, see n. 1, *supra*, by the historical evidence that it was intended to provide defendants with subpoena power that they lacked at common law,[10] by some scholarly comment,[11] and by a brief excerpt from the legislative history of the Clause.[12] We have, however, consistently

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sory Process Clause cases, *Washington* v. *Texas*, 388 U. S. 14 (1967), and *Chambers* v. *Mississippi*, 410 U. S. 284 (1973). The state-court decision from which petitioner quoted, *People* v. *Rayford*, 43 Ill. App. 3d 283, 356 N. E. 2d 1274 (1976), was also a Compulsory Process Clause case. The court in *Rayford* asserted that use of the preclusion sanction in criminal cases should be limited to extreme situations because in criminal cases "*due process* requires that a defendant be permitted to offer testimony of witnesses in his defense," *id.*, at 286–287, 356 N. E. 2d, at 1277 (emphasis added), citing *Washington*, *supra*.

A generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights, but in this case the authority cited by petitioner and the manner in which the fundamental right at issue has been described and understood by the Illinois courts make it appropriate to conclude that the constitutional question was sufficiently well presented to the state courts to support our jurisdiction.

[10] See Clinton, The Right to Present a Defense: An Emergent Constitutional Guarantee In Criminal Trials, 9 Ind. L. Rev. 711, 767 (1976).

[11] 8 J. Wigmore, Evidence § 2191, pp. 68–70 (J. McNaughton rev. 1961).

[12] "Mr. BURKE moved to amend this proposition in such a manner as to leave it in the power of the accused to put off the trial to the next session, provided he made it appear to the court that the evidence of the witnesses, for whom process was granted but not served, was material to his defence.

"Mr. HARTLEY said, that in securing him the right of compulsory process, the Government did all it could; the remainder must lie in the discretion of the court.

"Mr. SMITH, of South Carolina, thought the regulation would come properly in, as part of the Judicial system.

"The question on MR. BURKE's motion was taken and lost; ayes 9, noes 41." 1 Annals of Cong. 756 (1789).

given the Clause the broader reading reflected in contemporaneous state constitutional provisions.[13]

As we noted just last Term, "[o]ur cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania* v. *Ritchie*, 480 U. S. 39, 56 (1987). Few rights are more fundamental than that of an accused to present witnesses in his own defense, see, *e. g.*, *Chambers* v. *Mississippi*, 410 U. S. 284, 302 (1973). Indeed, this right is an essential attribute of the adversary system itself.

> "We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and

[13] "Particulars varied from state to state, but the provisions reflected a common principle. Three states emphasized the right to present evidence, guaranteeing the accused the right 'to call for evidence in his favour.' Two emphasized the subpoena power, giving the defendant the right to produce 'all proofs that may be favorable' to him. North Carolina combined the right to put on a defense with the right of confrontation, guaranteeing the right 'to confront the accusers and witnesses with other testimony.' Delaware emphasized the defendant's interest in sworn testimony, giving him the right 'to examine evidence on oath in his favour.' New Jersey opted for a principle of equality between the parties: '[A]ll criminals shall be admitted to the same privileges of witnesses and counsel, as their prosecutors are or shall be entitled to.' Maryland consolidated several interests, guaranteeing the defendant the right 'to examine [his] witnesses . . . on oath,' and 'to have process for his witnesses.'

"Some of the state provisions originated in English statutes, some in colonial enactments, and some were original. Regardless, they all reflected the principle that the defendant must have a meaningful opportunity, at least as advantageous as that possessed by the prosecution, to establish the essential elements of his case. The states pressed the principle so vigorously that the framers of the federal Bill of Rights included it in the sixth amendment in a distinctive formulation of their own." Westen, The Compulsory Process Clause, 73 Mich. L. Rev. 71, 94–95 (1974) (footnotes omitted).

> comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense." *United States* v. *Nixon*, 418 U. S. 683, 709 (1974).

The right to compel a witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact. The right to offer testimony is thus grounded in the Sixth Amendment even though it is not expressly described in so many words:

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Washington* v. *Texas*, 388 U. S. 14, 19 (1967).

The right of the defendant to present evidence "stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States." *Id.*, at 18. We cannot accept the State's argument that this constitutional right may never be offended by the imposition of a discovery sanction that entirely excludes the testimony of a material defense witness.

III

Petitioner's claim that the Sixth Amendment creates an absolute bar to the preclusion of the testimony of a surprise witness is just as extreme and just as unacceptable as the State's position that the Amendment is simply irrelevant. The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. The Compulsory Process Clause provides him with an effective weapon, but it is a weapon that cannot be used irresponsibly.

There is a significant difference between the Compulsory Process Clause weapon and other rights that are protected by the Sixth Amendment—its availability is dependent entirely on the defendant's initiative. Most other Sixth Amendment rights arise automatically on the initiation of the adversary process and no action by the defendant is necessary to make them active in his or her case.[14] While those rights shield the defendant from potential prosecutorial abuses, the right to compel the presence and present the testimony of witnesses provides the defendant with a sword that may be employed to rebut the prosecution's case. The decision whether to employ it in a particular case rests solely with the defendant. The very nature of the right requires that its effective use be preceded by deliberate planning and affirmative conduct.

The principle that undergirds the defendant's right to present exculpatory evidence is also the source of essential limitations on the right. The adversary process could not

[14] As one commentator has noted:

"The defendant's rights to be informed of the charges against him, to receive a speedy and public trial, to be tried by a jury, to be assisted by counsel, and to be confronted with adverse witnesses are designed to restrain the prosecution by regulating the procedures by which it presents its case against the accused. They apply in every case, whether or not the defendant seeks to rebut the case against him or to present a case of his own. Compulsory process, on the other hand, comes into play at the close of the prosecution's case. It operates exclusively at the defendant's initiative and provides him with affirmative aid in presenting his defense." *Id.*, at 74.

function effectively without adherence to rules of procedure that govern the orderly presentation of facts and arguments to provide each party with a fair opportunity to assemble and submit evidence to contradict or explain the opponent's case. The trial process would be a shambles if either party had an absolute right to control the time and content of his witnesses' testimony. Neither may insist on the right to interrupt the opposing party's case, and obviously there is no absolute right to interrupt the deliberations of the jury to present newly discovered evidence. The State's interest in the orderly conduct of a criminal trial is sufficient to justify the imposition and enforcement of firm, though not always inflexible, rules relating to the identification and presentation of evidence.[15]

The defendant's right to compulsory process is itself designed to vindicate the principle that the "ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *United States* v. *Nixon*, 418 U. S., at 709. Rules that provide for pretrial discovery of an opponent's witnesses serve the same high purpose.[16] Discovery, like cross-examination, minimizes the risk that a judgment will be predicated on incom-

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[15] "In the exercise of [the right to present witnesses], the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers* v. *Mississippi*, 410 U. S., at 302.

[16] "Notice-of-alibi rules, now in use in a large and growing number of States, are based on the proposition that the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial. See, *e. g.*, Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth?, 1963 Wash. U. L. Q. 279; American Bar Association Project on Standards for Criminal Justice, Discovery and Procedure Before Trial 23–43 (Approved Draft 1970); Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L. J. 1149 (1960). The growth of such discovery devices is a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system." *Wardius* v. *Oregon*, 412 U. S. 470, 473–474 (1973).

plete, misleading, or even deliberately fabricated testimony. The "State's interest in protecting itself against an eleventh-hour defense"[17] is merely one component of the broader public interest in a full and truthful disclosure of critical facts.

To vindicate that interest we have held that even the defendant may not testify without being subjected to cross-examination. *Brown* v. *United States*, 356 U. S. 148, 156 (1958). Moreover, in *United States* v. *Nobles*, 422 U. S. 225 (1975), we upheld an order excluding the testimony of an expert witness tendered by the defendant because he had refused to permit discovery of a "highly relevant" report. Writing for the Court, Justice Powell explained:

> "The court's preclusion sanction was an entirely proper method of assuring compliance with its order. Respondent's argument that this ruling deprived him of the Sixth Amendment rights to compulsory process and cross-examination misconceives the issue. The District Court did not bar the investigator's testimony. Cf. *Washington* v. *Texas*, 388 U. S. 14, 19 (1967). It merely prevented respondent from presenting to the jury a partial view of the credibility issue by adducing the investigator's testimony and thereafter refusing to disclose the contemporaneous report that might offer further critical insights. *The Sixth Amendment does not confer the*

[17] "Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate. Reflecting this interest, notice-of-alibi provisions, dating at least from 1927, are now in existence in a substantial number of States. The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as 'due process' is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence." *Williams* v. *Florida*, 399 U. S. 78, 81–82 (1970) (footnotes omitted).

> *right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth.* Deciding, as we do, that it was within the court's discretion to assure that the jury would hear the full testimony of the investigator rather than a truncated portion favorable to respondent, we think it would be artificial indeed to deprive the court of the power to effectuate that judgment. Nor do we find constitutional significance in the fact that the court in this instance was able to exclude the testimony in advance rather than receive it in evidence and thereafter charge the jury to disregard it when respondent's counsel refused, as he said he would, to produce the report." *Id.*, at 241 (emphasis added).

Petitioner does not question the legitimacy of a rule requiring pretrial disclosure of defense witnesses, but he argues that the sanction of preclusion of the testimony of a previously undisclosed witness is so drastic that it should never be imposed. He argues, correctly, that a less drastic sanction is always available. Prejudice to the prosecution could be minimized by granting a continuance or a mistrial to provide time for further investigation; moreover, further violations can be deterred by disciplinary sanctions against the defendant or defense counsel.

It may well be true that alternative sanctions are adequate and appropriate in most cases, but it is equally clear that they would be less effective than the preclusion sanction and that there are instances in which they would perpetuate rather than limit the prejudice to the State and the harm to the adversary process. One of the purposes of the discovery rule itself is to minimize the risk that fabricated testimony will be believed. Defendants who are willing to fabricate a defense may also be willing to fabricate excuses for failing to comply with a discovery requirement. The risk of a contempt vio-

lation may seem trivial to a defendant facing the threat of imprisonment for a term of years. A dishonest client can mislead an honest attorney, and there are occasions when an attorney assumes that the duty of loyalty to the client outweighs elementary obligations to the court.

We presume that evidence that is not discovered until after the trial is over would not have affected the outcome.[18] It is equally reasonable to presume that there is something suspect about a defense witness who is not identified until after the 11th hour has passed. If a pattern of discovery violations is explicable only on the assumption that the violations were designed to conceal a plan to present fabricated testimony, it would be entirely appropriate to exclude the tainted evidence regardless of whether other sanctions would also be merited.

In order to reject petitioner's argument that preclusion is *never* a permissible sanction for a discovery violation it is neither necessary nor appropriate for us to attempt to draft a comprehensive set of standards to guide the exercise of discretion in every possible case. It is elementary, of course, that a trial court may not ignore the fundamental character of the defendant's right to offer the testimony of witnesses in his favor. But the mere invocation of that right cannot automatically and invariably outweigh countervailing public interests. The integrity of the adversary process, which depends both on the presentation of reliable evidence and the

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[18] *Lloyd* v. *Gill*, 406 F. 2d 585, 587 (CA5 1969) (motion for new trial based on newly discovered evidence "may not be granted unless . . . the facts discovered are of such nature that they will probably change the result if a new trial is granted, . . . they have been discovered since the trial and could not by the exercise of due diligence have been discovered earlier, and . . . they are not merely cumulative or impeaching"); *Ragnar Benson, Inc.* v. *Kassab*, 325 F. 2d 591, 594 (CA3 1963) ("[C]ourts will indulge all presumptions in favor of the validity of a verdict"); *Rowlik* v. *Greenfield*, 87 F. Supp. 997, 1001 (ED Pa. 1949) ("[N]ew trials should not be allowed simply because after the verdict the losing party has come upon some witness or information theretofore unknown to him or his attorney").

rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process must also weigh in the balance.[19]

A trial judge may certainly insist on an explanation for a party's failure to comply with a request to identify his or her witnesses in advance of trial. If that explanation reveals that the omission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it would be entirely consistent with the purposes of the Compulsory Process Clause simply to exclude the witness' testimony.[20] Cf. *United States* v. *Nobles*, 422 U. S. 225 (1975).

The simplicity of compliance with the discovery rule is also relevant. As we have noted, the Compulsory Process Clause cannot be invoked without the prior planning and affirmative conduct of the defendant. Lawyers are accustomed to meeting deadlines. Routine preparation involves location and interrogation of potential witnesses and the serving of sub-

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[19] See, *e. g.*, *Fendler* v. *Goldsmith*, 728 F. 2d 1181, 1188–1190 (CA9 1983) (giving consideration to the effectiveness of less severe sanctions, the impact of preclusion on the evidence at trial and the outcome of the case, the extent of prosecutorial surprise or prejudice, and whether the violation was willful).

[20] There may be cases in which a defendant has legitimate objections to disclosing the identity of a potential witness. See Note, The Preclusion Sanction—A Violation of the Constitutional Right to Present a Defense, 81 Yale L. J. 1342, 1350 (1972). Such objections, however, should be raised in advance of trial in response to the discovery request and, if the parties are unable to agree on a resolution, presented to the court. Under the Federal Rules of Criminal Procedure and under the rules adopted by most States, a party may request a protective order if he or she has just cause for objecting to a discovery request. See, *e. g.*, Fed. Rule Crim. Proc. 16(d)(1); Ill. Sup. Ct. Rule 412(i). In this case, there is no issue concerning the validity of the discovery requirement or petitioner's duty to comply with it. There is also no indication that petitioner ever objected to the prosecution's discovery request.

poenas on those whose testimony will be offered at trial. The burden of identifying them in advance of trial adds little to these routine demands of trial preparation.[21]

It would demean the high purpose of the Compulsory Process Clause to construe it as encompassing an absolute right to an automatic continuance or mistrial to allow presumptively perjured testimony to be presented to a jury. We reject petitioner's argument that a preclusion sanction is never appropriate no matter how serious the defendant's discovery violation may be.

IV

Petitioner argues that the preclusion sanction was unnecessarily harsh in this case because the *voir dire* examination of Wormley adequately protected the prosecution from any possible prejudice resulting from surprise. Petitioner also contends that it is unfair to visit the sins of the lawyer upon his client. Neither argument has merit.

More is at stake than possible prejudice to the prosecution. We are also concerned with the impact of this kind of conduct on the integrity of the judicial process itself. The trial judge found that the discovery violation in this case was both willful and blatant.[22] In view of the fact that petitioner's counsel

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[21] "In the case before us, the notice-of-alibi rule by itself in no way affected petitioner's crucial decision to call alibi witnesses or added to the legitimate pressures leading to that course of action. At most, the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial. Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself." *Williams* v. *Florida*, 399 U. S., at 85.

[22] The trial judge also expressed concern about discovery violations in other trials. If those violations involved the same attorney, or otherwise contributed to a concern about the trustworthiness of Wormley's 11th-hour testimony, they were relevant. Unrelated discovery violations in other litigation would not, however, normally provide a proper basis for curtailing the defendant's constitutional right to present a complete defense.

had actually interviewed Wormley during the week before the trial began and the further fact that he amended his Answer to Discovery on the first day of trial without identifying Wormley while he did identify two actual eyewitnesses whom he did not place on the stand, the inference that he was deliberately seeking a tactical advantage is inescapable. Regardless of whether prejudice to the prosecution could have been avoided in this particular case, it is plain that the case fits into the category of willful misconduct in which the severest sanction is appropriate. After all, the court, as well as the prosecutor, has a vital interest in protecting the trial process from the pollution of perjured testimony. Evidentiary rules which apply to categories of inadmissible evidence—ranging from hearsay to the fruits of illegal searches—may properly be enforced even though the particular testimony being offered is not prejudicial. The pretrial conduct revealed by the record in this case gives rise to a sufficiently strong inference that "witnesses are being found that really weren't there," to justify the sanction of preclusion.[23]

The argument that the client should not be held responsible for his lawyer's misconduct strikes at the heart of the attorney-client relationship. Although there are basic rights

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[23] It should be noted that in Illinois, the sanction of preclusion is reserved for only the most extreme cases. In *People* v. *Rayford*, the Illinois Appellate Court explained:

"The exclusion of evidence is a drastic measure; and the rule in civil cases limits its application to flagrant violations, where the uncooperative party demonstrates a 'deliberate contumacious or unwarranted disregard of the court's authority.' (*Schwartz* v. *Moats*, 3 Ill. App. 3d 596, 599, 277 N. E. 2d 529, 531; *Department of Transportation* v. *Mainline Center, Inc.*, 38 Ill. App. 3d 538, 347 N. E. 2d 837.) The reasons for restricting the use of the exclusion sanction to only the most extreme situations are even more compelling in the case of criminal defendants, where due process requires that a defendant be permitted to offer testimony of witnesses in his defense. (*Washington* v. *Texas*, 388 U. S. 14 . . . .) 'Few rights are more fundamental than that of an accused to present witnesses in his own defense.' (*Chambers* v. *Mississippi*, 410 U. S. 284, 302 . . . .)" 43 Ill. App. 3d, at 286–287, 356 N. E. 2d, at 1277.

that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client,[24] the lawyer has—and must have—full authority to manage the conduct of the trial. The adversary process could not function effectively if every tactical decision required client approval. Moreover, given the protections afforded by the attorney-client privilege and the fact that extreme cases may involve unscrupulous conduct by both the client and the lawyer, it would be highly impracticable to require an investigation into their relative responsibilities before applying the sanction of preclusion. In responding to discovery, the client has a duty to be candid and forthcoming with the lawyer, and when the lawyer responds, he or she speaks for the client. Putting to one side the exceptional cases in which counsel is ineffective, the client must accept the consequences of the lawyer's decision to forgo cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain witnesses in advance of trial. In this case, petitioner has no greater right to disavow his lawyer's decision to conceal Wormley's identity until after the trial had commenced than he has to disavow the decision to refrain from adducing testimony from the eyewitnesses who were identified in the Answer to Discovery. Whenever a lawyer makes use of the sword provided by the Compulsory Process Clause, there is some risk that he may wound his own client.

The judgment of the Illinois Appellate Court is

Affirmed.

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[24] See, *e. g.*, *Brookhart* v. *Janis*, 384 U. S. 1, 7–8 (1966) (defendant's constitutional right to plead not guilty and to have a trial where he could confront and cross-examine adversary witness could not be waived by his counsel without defendant's consent); *Doughty* v. *State*, 470 N. E. 2d 69, 70 (Ind. 1984) (record must show "personal communication of the defendant to the court that he chooses to relinquish the right [to a jury trial]"); *Cross* v. *United States*, 117 U. S. App. D. C. 56, 325 F. 2d 629 (1963) (waiver of right to be present during trial).

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

Criminal discovery is not a game. It is integral to the quest for truth and the fair adjudication of guilt or innocence. Violations of discovery rules thus cannot go uncorrected or undeterred without undermining the truthseeking process. The question in this case, however, is not whether discovery rules should be enforced but whether the need to correct and deter discovery violations requires a sanction that itself distorts the truthseeking process by excluding material evidence of innocence in a criminal case. I conclude that, at least where a criminal defendant is not personally responsible for the discovery violation, alternative sanctions are not only adequate to correct and deter discovery violations but are far superior to the arbitrary and disproportionate penalty imposed by the preclusion sanction. Because of this, and because the Court's balancing test creates a conflict of interest in every case involving a discovery violation, I would hold that, absent evidence of the defendant's personal involvement in a discovery violation, the Compulsory Process Clause *per se* bars discovery sanctions that exclude criminal defense evidence.

I

Before addressing the merits, I pause to explicate what I take as implicit in the Court's conclusion that the defendant's constitutional claims were "sufficiently well presented to the state courts to support our jurisdiction." *Ante*, at 407, n. 9. I quite agree with the Court that the constitutional claims were not waived in the Appellate Court of Illinois, both because the defendant's appellate brief adequately presented the Sixth Amendment claim, see *ibid.*, and because the analysis in this case would essentially be the same under the Due Process Clause, see *ante*, at 406–407, n. 9. The Court does not, however, explain its conclusion that the constitutional claims were not waived at trial. I conclude that, although as a matter of Illinois law the defendant waived his federal con-

stitutional claims at trial, as a matter of federal law that waiver does not bar review in this Court.

The only legal challenge to the witness preclusion that the defendant raised at trial was one sentence in his motion for new trial stating: "The Court erred by not letting a witness for defendant testify before the Jury." Record 412. The Appellate Court of Illinois stated that the only witness preclusion issue before it on appeal was whether "the trial court abused its discretion by excluding the testimony of a defense witness as a sanction for violation of the discovery rules." 141 Ill. App. 3d 839, 841, 491 N. E. 2d 3, 4–5 (1986). The Appellate Court never addressed either the compulsory process or due process claims concerning witness preclusion, *id.*, at 844–845, 491 N. E. 2d, at 6–7, even though the briefs implicitly presented the former claim and expressly asserted the latter. This alone may not warrant the assumption that the Appellate Court implicitly held that a motion for new trial stating that "the court erred" preserved only an abuse of discretion claim and waived any constitutional claims. But the Appellate Court of Illinois had already reached that holding in an identical case. See *People* v. *Douthit*, 51 Ill. App. 3d 751, 366 N. E. 2d 950 (1977). The court in *Douthit* stated:

> "Despite appellate counsel's excellent brief on the issue of the constitutionality, as applied to a criminal defendant of that portion of Supreme Court Rule 415(g)(i) (Ill. Rev. Stat. 1975, ch. 110A, par. 415(g)(i)) authorizing exclusion of evidence for failure to comply with a discovery rule, we deem that issue, raised for the first time on appeal, to have been waived. There is nothing in the record to indicate that defense counsel ever raised any constitutional objection during the extensive in-chambers discussion summarized above, nor did he do so in his post-trial motion, which requests a new trial solely on the ground that '[t]he court erred in ruling that the defendant could not call Glen Muench and Rocky Reed to testify to defendant's state of intoxication at the time

> of the commission of the alleged burglary.' *As we read this motion, it raises only the non-constitutional question whether the trial court abused its discretion in exercising the exclusion sanction.* Failure to raise an issue, including a constitutional issue, in the written motion for a new trial constitutes waiver of that issue and it cannot be urged as a ground for reversal on review." *Id.*, at 753–754, 366 N. E. 2d, at 952–953 (citations and footnotes omitted; emphasis added).

Although different districts of the Appellate Court of Illinois decided *Douthit* and this case, given that at trial both defendants presented identical challenges to the identical provision in the identical fashion, both appellate briefs raised the identical constitutional and nonconstitutional claims, and both districts considered only the abuse of discretion claim, I am constrained to conclude that in this case, like in *Douthit*, the Appellate Court of Illinois deemed the constitutional claims waived as a matter of Illinois law.

The conclusion that the Appellate Court of Illinois deemed the federal constitutional claims waived as a matter of state law does not, of course, mean that they are waived as a matter of federal law. "[W]e have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question." *Henry* v. *Mississippi*, 379 U. S. 443, 447 (1965). Specifically, it is well established that where a state court possesses the power to disregard a procedural default in exceptional cases, the state court's failure to exercise that power in a particular case does not bar review in this Court. *Williams* v. *Georgia*, 349 U. S. 375, 383–384 (1955); see also *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229, 233–234 (1969); *Henry*, *supra*, at 449, n. 5. The Illinois Supreme and Appellate Courts possess such a power. Illinois Supreme Court Rule 615(a) provides: "Plain errors or defects affecting substantial rights may be noticed [on appeal] even though they were not brought to the

attention of the trial court." Those courts frequently rely on this provision to address, in their discretion, issues that have been waived at trial. See Jenner, Tone, & Martin, Historical and Practice Notes following Ill. Ann. Stat., ch. 110A, ¶615 (1985) (citing 16 appellate cases decided between 1979 and 1981 as examples of cases invoking plain error alone); see also, *e. g.*, *People* v. *Visnack*, 135 Ill. App. 3d 113, 118, 481 N. E. 2d 744, 748 (1985) (invoking substantial rights exception despite waiver). Apparently, the Appellate Court below declined to exercise this discretion and deemed the waiver binding. Since, under *Williams* v. *Georgia*, such a decision does not bar our review, we are free to address the merits despite the state-law waiver.

II

A

On the merits, I start from the same premise as the Court—that the Compulsory Process Clause of the Sixth Amendment embodies a substantive right to present criminal defense evidence before a jury. See *ante*, at 408–409; see also, *e. g.*, *Pennsylvania* v. *Ritchie*, 480 U. S. 39, 56 (1987). Although I thus join the Court in rejecting the State's argument that the Clause embodies only the right to subpoena witnesses, I cannot agree with the Court's assertion that "[t]he State's argument is supported by the plain language of the Clause." *Ante*, at 407. The Compulsory Process Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." This plain language supports the State's argument only if one assumes that the most natural reading of constitutional language is the least meaningful. For the right to subpoena defense witnesses would be a hollow protection indeed if the government could simply refuse to allow subpoenaed defense witnesses to testify. As this Court has recognized for the last 20 years, the right to subpoena witnesses must mean the right to subpoena them for a useful

purpose, and thus necessarily implies a substantive limitation on the government's power to prevent those witnesses from testifying.

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in *plain* terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's *to the jury* so it may decide where the truth lies." *Washington* v. *Texas*, 388 U. S. 14, 19 (1967) (emphasis added).
>
> "The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use." *Id.*, at 23.

The substantive limitation on excluding criminal defense evidence secured by the plain terms of the Compulsory Process Clause is also grounded in the general constitutional guarantee of due process. See *Chambers* v. *Mississippi*, 410 U. S. 284, 298–302 (1973); see also *Rock* v. *Arkansas*, 483 U. S. 44, 51 (1987); *Crane* v. *Kentucky*, 476 U. S. 683, 690–691 (1986).

The Compulsory Process and Due Process Clauses thus require courts to conduct a searching substantive inquiry whenever the government seeks to exclude criminal defense evidence. After all, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers*, *supra*, at 302. The exclusion of criminal defense evidence undermines the central truthseeking aim of our criminal justice system, see *United States* v. *Nixon*, 418 U. S. 683, 709 (1974), because it deliberately distorts the record at the risk of misleading the jury into convicting an innocent person. Surely the paramount value our criminal justice system places on acquitting the innocent, see, *e. g.*, *In re Winship*, 397 U. S. 358 (1970), demands close scrutiny of any law preventing the jury from hearing evidence fa-

vorable to the defendant. On the other hand, the Compulsory Process Clause does not invalidate every restriction on the presentation of evidence. The Clause does not, for example, require criminal courts to admit evidence that is irrelevant, *Crane*, *supra*, at 689–690, testimony by persons who are mentally infirm, see *Washington* v. *Texas*, *supra*, at 23, n. 21, or evidence that represents a half-truth, see *United States* v. *Nobles*, 422 U. S. 225, 241 (1975). That the inquiry required under the Compulsory Process Clause is sometimes difficult does not, of course, justify abandoning the task altogether.

Accordingly, this Court has conducted searching substantive inquiries into the rationales underlying every challenged exclusion of criminal defense evidence that has come before it to date. That scrutiny has led the Court to strike as constitutionally unjustifiable "rules that prevent whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief," such as a rule against introducing the testimony of an alleged accomplice, *Washington* v. *Texas*, *supra*, at 22–23; an application of the hearsay rule to statements that "were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability," *Chambers*, *supra*, at 300; the exclusion of evidence bearing on the credibility of a voluntary confession, *Crane*, *supra*, at 688–691; and a *per se* rule excluding all posthypnosis testimony, *Rock*, *supra*, at 56–62. Based on a thorough review of the relevant case law, this Court defined the standard governing the constitutional inquiry just last Term in *Rock* v. *Arkansas*, concluding that restrictions on the right to present criminal defense evidence can be constitutional only if they "'accommodate other legitimate interests in the criminal trial process'" and are not "arbitrary or disproportionate to the purposes they are designed to serve." *Rock* v. *Arkansas*, *supra*, at 55–56, quoting *Chambers*, *supra*, at 295.[1]

[1] Although the Court in *Rock* was addressing the specific issue of the defendant's right to offer his own testimony, it derived the standard it articu-

B

The question at the heart of this case, then, is whether precluding a criminal defense witness from testifying bears an arbitrary and disproportionate relation to the purposes of discovery, at least absent any evidence that the defendant was personally responsible for the discovery violations. This question is not answered by merely pointing out that discovery, like compulsory process, serves truthseeking interests. Compare *ante*, at 411–412. I would be the last to deny the utility of discovery in the truthseeking process. See Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth?, 1963 Wash. U. L. Q. 279. By aiding effective trial preparation, discovery helps develop a full account of the relevant facts, helps detect and expose attempts to falsify evidence, and prevents factors such as surprise from influencing the outcome at the expense of the merits of the case. But these objectives are accomplished by compliance with the discovery rules, not by the exclusion of material evidence. Discovery sanctions serve the objectives of discovery by correcting for the adverse effects of discovery violations and deterring future discovery violations from occurring. If sanctions other than excluding evidence can sufficiently correct and deter discovery violations,[2] then there is no reason to resort to a sanction that itself constitutes "a conscious mandatory distortion of the fact-finding process whenever applied." Weinstein, Some Difficulties in Devising Rules for

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lated from general compulsory process case law on the theory that the right to present one's own testimony extended at least as far as the right to present the testimony of others. 483 U. S., at 52–53.

[2] Illinois Supreme Court Rule 415(g) alone supplies a broad array of available discovery sanctions:

"(i) If . . . a party has failed to comply with an applicable discovery rule . . . the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, exclude such evidence, or enter such other order as it deems just under the circumstances.

"(ii) Wilful violation by counsel of an applicable discovery rule . . . may subject counsel to appropriate sanctions by the court."

Determining Truth in Judicial Trials, 66 Colum. L. Rev. 223, 237 (1966).

(1)

The use of the preclusion sanction as a corrective measure—that is, as a measure for addressing the adverse impact a discovery violation might have on truthseeking in the case at hand—is asserted to have two justifications: (1) it bars the defendant from introducing testimony that has not been tested by discovery, see *ante*, at 411–413; and (2) it screens out witnesses who are inherently suspect because they were not disclosed until trial, see *ante*, at 413–416. The first justification has no bearing on this case because the defendant does not insist on a right to introduce a witness' testimony without giving the prosecution an opportunity for discovery. He concedes that the trial court was within its authority in requiring the witness to testify first out of the presence of the jury, and he concedes that the trial court could have granted the prosecution a continuance to give it sufficient time to conduct further discovery concerning the witness and the proffered testimony. See Brief for Petitioner 18–19. He argues only that he should not be completely precluded from introducing the testimony.

Nobles and *Brown* v. *United States*, 356 U. S. 148, 156 (1958) are thus inapposite. Compare *ante*, at 412–413. In *Nobles* the defendant sought to impeach the credibility of prosecution witnesses with testimony from a defense investigator regarding statements those witnesses had made in interviews with the investigator. 422 U. S., at 227–229. The trial court ruled that the investigator could not testify unless the defense disclosed the report the investigator had written summarizing the interviews. *Ibid.* This Court properly rejected the defendant's claim that his right to compulsory process had been violated because:

> "*The District Court did not bar the investigator's testimony.* Cf. *Washington* v. *Texas*, 388 U. S. 14, 19 (1967).

> It merely prevented respondent from presenting to the jury a partial view of the credibility issue by adducing the investigator's testimony and thereafter refusing to disclose the contemporaneous report that might offer further critical insights. The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." *Id.*, at 241 (emphasis added).

Here, by contrast, the trial court *did* bar the proffered defense testimony. It did not, as in *Nobles*, simply condition the right to introduce the testimony on the defendant's disclosure of evidence that might demonstrate weaknesses in the testimony. The authority of trial courts to prevent the presentation of a "half-truth" by ordering further discovery is thus not at issue here. For similar reasons, the holding in *Brown* (that a person who testifies at her own denaturalization proceeding waives her Fifth Amendment right not to answer questions on cross-examination) can have no bearing on this case.

Nor, despite the Court's suggestions, see *ante*, at 414–417, is the preclusion at issue here justifiable on the theory that a trial court can exclude testimony that it presumes or finds suspect. In the first place, the trial court did not purport to rely on any such presumption or finding in this case. Rather, *after* ruling that he would exclude the testimony because of the discovery violation, the judge stated:

> "Further, *for whatever value it is, because this is a jury trial*, I have a great deal of doubt in my mind as to the veracity of this young man that testified as to whether he was an eyewitness on the scene, sees guns that are wrapped up. He doesn't know Ray but he stops Ray.

> "*At any rate*, Mr. Wormley is not going to testify, be a witness in this courtroom." App. 28 (emphasis added).

The judge gave no indication that he was willing to exclude the testimony based solely on its presumptive or apparent lack of credibility. Nor, apparently, would Illinois law allow him to do so. See generally, *e. g.*, *People* v. *Van Dyke*, 414 Ill. 251, 254, 111 N. E. 2d 165, 167 ("The credibility of the witnesses presented, as well as the weight of the evidence, [is] for the jury to determine and the court will not substitute its judgment therefor"), cert. denied, 345 U. S. 978 (1953); *Village of DesPlaines* v. *Winkelman*, 270 Ill. 149, 159, 110 N. E. 417, 422 (1915) ("[I]t is . . . for the jury to determine . . . to which witnesses they will give the greatest weight, and not for the court to tell them"). Indeed, far from being able to prevent the jury from hearing the testimony of witnesses that the trial court deems untrustworthy, Illinois trial courts are not even permitted to *comment* on the credibility of witnesses to the jury.[3] No Illinois case interpreting Rule 415(g) suggests that the Rule gives a trial judge special authority to exclude criminal defense witnesses based on their apparent or presumed unreliability.

In addition, preventing a jury from hearing the proffered testimony based on its presumptive or apparent lack of credibility would be antithetical to the principles laid down in *Washington* v. *Texas*, 388 U. S., at 20–23, and reaffirmed in *Rock* v. *Arkansas*, 483 U. S., at 53–55. We there criticized rules that disqualified witnesses who had an interest in the

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[3] See, *e. g.*, *People* v. *Santucci*, 24 Ill. 2d 93, 98, 180 N. E. 2d 491, 493 (1962) ("Ultimate decisions of fact must fairly be left to the jury, as must be the determination of the credibility of witnesses and the weight to be afforded their testimony, and to this end it is not the province of the judge, in a criminal case, to convey his opinions on such matters to the jurors by word or deed"); *People* v. *Heidorn*, 114 Ill. App. 3d 933, 936, 449 N. E. 2d 568, 572 (1983) ("While the trial judge has wide discretion in the conduct of trial, he must not make comments or insinuations, by word or conduct, indicative of an opinion on the credibility of a witness . . .").

litigation as having the "effect of suppressing the truth," *Washington* v. *Texas*, *supra*, at 20, noting that:

> "[D]isqualifications for interest . . . rested on the unstated premises that the right to present witnesses was subordinate to the court's interest in preventing perjury, and that erroneous decisions were best avoided by preventing the jury from hearing any testimony that might be perjured, even if it were the only testimony available on a crucial issue.
>
> "'. . . [T]he conviction of our time is that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court.' . . .
>
> ". . . [W]e believe that [the latter] reasoning [is] required by the Sixth Amendment." 388 U. S., at 21–22, quoting *Rosen* v. *United States*, 245 U. S. 467, 471 (1918).

See also *Rock* v. *Arkansas*, *supra*, at 53–55 (quoting and restating the above). The Court in *Washington* v. *Texas* accordingly concluded that "arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief" are unconstitutional. 388 U. S., at 22.

Although persons who are not identified as defense witnesses until trial may not be as trustworthy as other categories of persons, surely any presumption that they are so suspect that the jury can be prevented from even listening to their testimony is at least as arbitrary as presumptions excluding an accomplice's testimony, *Washington* v. *Texas*, *supra*, hearsay statements bearing indicia of reliability, *Chambers* v. *Mississippi*, 410 U. S. 284 (1973), or a defendant's posthypnosis testimony, *Rock*, *supra*—all of which have been declared unconstitutional. Compare *ante*, at 414–417.

The proper method, under Illinois law[4] and *Washington* v. *Texas*, *supra*, for addressing the concern about reliability is for the prosecutor to inform the jury about the circumstances casting doubt on the testimony, thus allowing the jury to determine the credit and weight it wants to attach to such testimony.[5] The power of the court to take that kind of corrective measure is undisputed; the defendant concedes that the court could have allowed the prosecutor to comment on the defense's failure to disclose the identity of the witness until trial. See Brief for Petitioner 18–19.

Leaving deterrence aside for the moment, then, precluding witness testimony is clearly arbitrary and disproportionate to the purpose discovery is intended to serve—advancing the quest for truth. Alternative sanctions—namely, granting the prosecution a continuance and allowing the prosecutor to comment on the witness concealment—can correct for any adverse impact the discovery violation would have on the truthseeking process. Moreover, the alternative sanctions, unlike the preclusion sanction, do not distort the truthseeking process by excluding material evidence of innocence.

(2)

Of course, discovery sanctions must include more than corrective measures. They must also include punitive measures that can deter future discovery violations from taking place. Otherwise, parties will have little reason not to seek

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[4] Cf. *People* v. *Rayford*, 43 Ill. App. 3d 283, 288, 356 N. E. 2d 1274, 1278 (1976). The reasons cited by Illinois courts for forbidding judicial comment do not apply with the same force to prosecutorial comment. See, *e. g.*, *Santucci*, *supra*, at 98, 180 N. E. 2d, at 493; *Heidorn*, *supra*, at 937, 449 N. E. 2d, at 572.

[5] Precluding a witness based solely on a judge's belief that the witness lacks credibility might also implicate the constitutional right to a jury trial in that it usurps the jury's central function of assessing the credibility of witnesses. The constitutional right to a jury trial would mean little if a judge could exclude any defense witness whose testimony he or she did not credit.

tactical advantages by purposefully violating discovery rules and orders. Those violations that are not caught and corrected will then impose a significant cost on the truthseeking process, see *supra*, at 425; *ante*, at 411–412, that, in the long run, could conceivably outweigh the burden on truthseeking imposed by the preclusion sanction. Without some means of deterring discovery violations, moreover, the criminal system would continually be interrupted and distracted by continuances and other corrective measures. See *ante*, at 411.

In light of the availability of direct punitive measures, however, there is no good reason, at least absent evidence of the defendant's complicity, to countenance the arbitrary and disproportionate punishment imposed by the preclusion sanction. The central point to keep in mind is that witness preclusion operates as an effective deterrent only to the extent that it has a possible effect on the outcome of the trial. Indeed, it employs in part the possibility that a distorted record will cause a jury to convict a defendant of a crime he did not commit. Witness preclusion thus punishes discovery violations in a way that is both disproportionate—it might result in a defendant charged with a capital offense being convicted and receiving a death sentence he would not have received but for the discovery violation—and arbitrary—it might, in another case involving an identical discovery violation, result in a defendant suffering no change in verdict or, if charged with a lesser offense, being convicted and receiving a light or suspended sentence. In contrast, direct punitive measures (such as contempt sanctions or, if the attorney is responsible, disciplinary proceedings) can gradate the punishment to correspond to the severity of the discovery violation.

The arbitrary and disproportionate nature of the preclusion sanction is highlighted where the penalty falls on the defendant even though he bore no responsibility for the discovery violation. In this case, although there was ample evidence that the defense attorney willfully violated Rule

413(d),[6] there was no evidence that the defendant played any role in that violation. Nor did the trial court make any effort to determine whether the defendant bore any responsibility for the discovery violation. Indeed, reading the record leaves the distinct impression that the main reason the trial court excluded Wormley's testimony was the belief that the defense counsel had purposefully lied about when he had located Wormley. App. 25–28.

Worse yet, the trial court made clear that it was excluding Wormley's testimony not only in response to the defense counsel's actions in this case but also in response to the actions of other defense attorneys in other cases. The trial court stated:

> ". . . All right, I am going to deny Wormley an opportunity to testify here. He is not going to testify. I find this a blatent *[sic]* violation of the discovery rules, willful violation of the rules. I also feel that defense attorneys have been violating discovery in this courtroom in the last three or four cases blatently *[sic]* and I am going to put a stop to it and this is one way to do so." *Id.*, at 28.

Although the Court recognizes this problem, it offers no response other than the cryptic statement that "[u]nrelated discovery violations . . . would not . . . normally provide a proper basis for curtailing the defendant's constitutional right to present a complete defense." *Ante*, at 416, n. 22. We are left to wonder either why this case is abnormal or why an exclusion founded on an improper basis should be upheld.

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[6] On the second day of trial, Tuesday, March 27, 1984, defense counsel moved to amend his "Answer to Discovery" to include Alfred Wormley as a defense witness, stating that the defendant had told him about Wormley earlier but that he had not been able to locate Wormley previously. App. 12–13. The next day Wormley testified that defense counsel had visited him at his home and served him with a subpoena on Wednesday, March 21, 1984, five days before the trial began. *Id.*, at 22.

In the absence of any evidence that a defendant played any part in an attorney's willful discovery violation, directly sanctioning the attorney is not only fairer but *more* effective in deterring violations than excluding defense evidence. Compare *ante*, at 413–414. The threat of disciplinary proceedings, fines, or imprisonment will likely influence attorney behavior to a far greater extent than the rather indirect penalty threatened by evidentiary exclusion. Such sanctions were available here. Rather than punishing the defendant under Rule 415(g)(i), the trial court could have sanctioned the attorney under Rule 415(g)(ii), which provides that "Wilful violation by counsel of an applicable discovery rule . . . may subject counsel to appropriate sanctions by the court." See also App. 28 (threatening disciplinary proceedings). Direct sanctions against the attorney would have been particularly appropriate here since the discovery rule violated in this case places the obligation to comply with discovery not on the defendant, but directly on the attorney: providing that, upon motion by the State, a "*defense counsel* . . . shall furnish the State with . . . the names and last known addresses of persons he intends to call as witnesses . . . ." Ill. Sup. Ct. Rule 413(d) (emphasis added).

The situation might be different if the defendant willfully caused the discovery violation because, as the Court points out, see *ante*, at 413–414, some defendants who face the prospect of a lengthy imprisonment are arguably impossible to deter with direct punitive sanctions such as contempt. But that is no explanation for allowing defense witness preclusion where there is no evidence that the defendant bore any responsibility for the discovery violation. At a minimum, we would be obligated to remand for further factfinding to establish the defendant's responsibility. Deities may be able to visit the sins of the father on the son, but I cannot agree that courts should be permitted to visit the sins of the lawyer on the innocent client.

Nor is the issue resolved by analogizing to tactical errors an attorney might make such as failing to put witnesses on the stand that would have aided the defense. Compare *ante*, at 410, 417–418. Although we have sometimes held a defendant bound by tactical errors his attorney makes that fall short of ineffective assistance of counsel, we have not previously suggested that a client can be punished for an attorney's *misconduct*. There are fundamental differences between attorney misconduct and tactical errors. Tactical errors are products of a legitimate choice among tactical options. Such tactical decisions must be made within the adversary system, and the system requires attorneys to make them, operating under the presumption that the attorney will choose the course most likely to benefit the defendant. Although some of these decisions may later appear erroneous, penalizing attorneys for such miscalculations is generally an exercise in futility because the error is usually visible only in hindsight—at the time the tactical decision was made there was no obvious "incorrect" choice, and no prohibited one. In other words, the adversary system often cannot effectively deter attorney's tactical errors and does not want to deter tactical decisions. Thus, where a defense attorney makes a routine tactical decision not to introduce evidence at the proper time and the defense seeks to introduce the evidence later, deterrence measures may not be capable of preventing the untimely introduction of evidence from systemically disrupting trials, jury deliberations, or final verdicts. In those circumstances, treating the failure to introduce evidence at the proper time as a procedural default that binds the defendant is arguably the only means of systemically preventing such disruption—not because binding the defendant deters tactical errors any better than direct punitive sanctions but because binding the defendant to defense counsel's procedural default, by definition, eliminates the disruption. The actual operation of the adversary system generally bears out the analysis outlined above. Direct punitive sanctions are

not available to punish and deter routine tactical errors. If, however, the erroneous nature of the attorney's decision was sufficiently evident at the time, then the system does want to deter the attorney's behavior, and can and does do so by directly sanctioning the attorney for malpractice. It does not bind the defendant, who by establishing malpractice would have also established ineffective assistance of counsel.

The rationales for binding defendants to attorneys' routine tactical errors do not apply to attorney misconduct. An attorney is never faced with a legitimate choice that includes misconduct as an option. Although it may be that "[t]he adversary process could not function effectively if every tactical decision required client approval," *ante*, at 418, that concern is irrelevant here because a client has no authority to approve misconduct. Further, misconduct is not visible only with hindsight, as are many tactical errors. Consequently, misconduct is amenable to direct punitive sanctions against attorneys as a deterrent that can prevent attorneys from systemically engaging in misconduct that would disrupt the trial process. There is no need to take steps that will inflict the punishment on the defendant. Direct punitive sanctions are also more appropriate since the determination that misconduct occurred (and the level of penalty imposed) primarily turns on an assessment of the attorney's culpability rather than, as with procedural defaults, an assessment of the potential for disrupting the trial system. In this case there is no doubt that willfully concealing the identity of witnesses one intends to call at trial is attorney misconduct, that the government seeks to deter such behavior in all instances, and that the attorney knows such behavior is misconduct and not a legitimate tactical decision at the time it occurs. Direct punitive sanctions against the attorney are available. See Rule 415(g)(ii). And the decision to impose the evidentiary exclusion penalty in this case clearly turned on an assessment of the attorney's culpability. See App. 25–28; *People* v. *Rayford*, 43 Ill. App. 3d 283, 286, 356 N. E. 2d 1274, 1277

(1976) (exclusion only justifiable if the discovery violation is deliberate). No one contends that the same exclusion would have been justified if the failure to disclose Wormley's identity had been inadvertent.[7]

C

In short, I can think of no scenario that does not involve a defendant's willful violation of a discovery rule where alternative sanctions would not fully vindicate the purposes of discovery without distorting the truthseeking process by excluding evidence of innocence. Courts can couple corrective measures that will subject the testimony at issue to discovery and adverse credibility inferences with direct punitive measures that are both proportional to the discovery violation and directed at the actor responsible for it. Accordingly, absent evidence that the defendant was responsible for the discovery violation, the exclusion of criminal defense evidence is arbitrary and disproportionate to the purposes of discovery and criminal justice and should be *per se* unconstitutional. I thus cannot agree with the Court's case-by-case balancing approach or with its conclusion in this case that the exclusion was constitutional.

The Court's balancing approach, moreover, has the unfortunate effect of creating a conflict of interest in every case involving a willful discovery violation because the defense counsel is placed in a position where the best argument he can make on behalf of his client is: "Don't preclude the defense witness—punish me personally." In this very case, for example, the defense attorney became noticeably timid once the judge threatened to report his actions to the disciplinary

[7] The witness preclusion sanction thus cannot be justified on the theory that the defendant waived his right to introduce Wormley by failing to name him prior to trial. Indeed, far from being a procedural default, the exclusion of evidence is an unusual sanction applied only in drastic cases, *People* v. *Rayford*, 43 Ill. App. 3d, at 286–287, 356 N. E. 2d, at 1277, and the decision whether to apply it lies in the discretion of the trial court, 141 Ill. App. 3d 839, 844–845, 491 N. E. 2d 3, 7 (1986) (case below).

commission. App. 28–29. He did not argue: "Sure, bring me before the disciplinary commission; that's a much more appropriate sanction than excluding a witness who might get my client acquitted." I cannot see how we can expect defense counsel in this or any other case to act as vigorous advocates for the interests of their clients when those interests are adverse to their own.[8]

It seems particularly ironic that the Court should approve the exclusion of evidence in this case at a time when several of its Members have expressed serious misgivings about the evidentiary costs of exclusionary rules in other contexts. Surely the deterrence of constitutional violations cannot be less important than the deterrence of discovery violations. Nor can it be said that the evidentiary costs are more significant when they are imposed on the prosecution. For that would turn on its head what Justice Harlan termed the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U. S., at 372 (concurring opinion).

Discovery rules are important, but only as a means for helping the criminal system convict the guilty and acquit the innocent. Precluding defense witness testimony as a sanction for a defense counsel's willful discovery violation not only directly subverts criminal justice by basing convictions on a partial presentation of the facts, *United States* v. *Nixon*, 418 U. S., at 709, but is also arbitrary and disproportionate to any of the purposes served by discovery rules or discovery sanctions. The Court today thus sacrifices the paramount values of the criminal system in a misguided and unnecessary effort to preserve the sanctity of discovery. We may never

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[8] I also note that a case-by-case balancing approach will create uncertainty, spawn unnecessary litigation, and make it difficult to supervise the lower courts. Moreover, any exclusion of criminal defense evidence also has the important disadvantage of inviting an ineffective-assistance-of-counsel claim in every case in which it is applied. Direct sanctions against the attorney would yield no such opportunity to disrupt final verdicts.

know for certain whether the defendant or Bridges' brother fired the shot for which the defendant was convicted. We do know, however, that the jury that convicted the defendant was not permitted to hear evidence that would have both placed a gun in Bridges' brother's hands and contradicted the testimony of Bridges and his brother that they possessed no weapons that evening—and that, because of the defense counsel's 5-day delay in identifying a witness, an innocent man may be serving 10 years in prison. I dissent.

JUSTICE BLACKMUN, dissenting.

I join JUSTICE BRENNAN's dissenting opinion on the understanding—at least on my part—that it is confined in its reach to general reciprocal-discovery rules. I do not wish to have the opinion express for me any position as to permissible sanctions for noncompliance with rules designed for specific kinds of evidence as, for example, a notice-of-alibi rule. In a case such as that, the State's legitimate interests might well occasion a result different from what should obtain in the factual context of the present case.

UNITED STATES *v.* FAUSTO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 86–595. Argued October 7, 1987—Decided January 25, 1988

In November 1980, the Department of the Interior Fish and Wildlife Service (FWS) advised respondent, a nonpreference eligible employee in the excepted service, that it intended to dismiss him for a number of reasons, including unauthorized use of a Government vehicle. After he was discharged without being informed of grievance rights granted to him by the FWS regulations, respondent sought review by the Merit Systems Protection Board (MSPB), which dismissed his appeal on the ground that under the Civil Service Reform Act of 1978 (CSRA) a nonpreference eligible in the excepted service has no right to appeal to the MSPB. In 1982, the FWS reconsidered the matter, concluded that only a 30-day suspension for misuse of a Government vehicle was warranted, and offered respondent backpay from the date the suspension would have ended until the date the program for which he was hired closed. On respondent's appeal, the Secretary of the Interior upheld the FWS decision, rejecting respondent's claims that his suspension was unwarranted and that he was entitled to additional backpay for the 30 days and a period beyond the close of the program. Respondent then filed this action under the Back Pay Act in the Claims Court, which dismissed on the ground that the CSRA was exclusively applicable and did not provide for judicial review in this situation. The Court of Appeals reversed and remanded, holding that respondent could seek Claims Court review traditionally available under the Tucker Act based on the Back Pay Act, that his suspension was wrongful, and that he was entitled to backpay for the period of the suspension.

Held: The CSRA, which affords to nonpreference eligibles in the excepted service no administrative or judicial review of adverse personnel action of the type involved here, precludes judicial review for those employees under the Tucker Act based on the Back Pay Act. The CSRA was designed to replace the haphazard arrangements that had built up over almost a century with one integrated system for administrative and judicial review of adverse personnel action. The Act's comprehensive nature, its attention throughout to the rights of nonpreference excepted service employees, and the structure of the Act, combine to establish that its failure to include these employees in the provisions for administrative and judicial review of the type of adverse personnel action in-

volved here represents a congressional judgment that judicial review is not available. Interpreting the CSRA to foreclose review in this case is not contrary to the established principle of statutory construction that Congress will be presumed to have intended judicial review of agency action unless there is "persuasive reason" to believe otherwise. Here, in view of the statutory scheme, there is ample basis for applying the exception contained in the principle. Moreover, the principle of statutory construction disfavoring repeals by implication is not applicable here with regard to the CSRA's effect on the Back Pay Act. Rather, the classic judicial task of reconciling laws is involved. Pp. 443–455.

783 F. 2d 1020 and 791 F. 2d 1554, reversed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 455. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 455.

Christopher J. Wright argued the cause for the United States. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Willard*, *Deputy Solicitor General Cohen*, and *Robert A. Reutershan*.

John M. Nannes, by invitation of the Court, 480 U. S. 904, argued the cause and filed a brief as *amicus curiae* in support of the judgment below. Respondent filed a brief *pro se*.*

JUSTICE SCALIA delivered the opinion of the Court.

Respondent Joseph A. Fausto, an employee of the Department of the Interior Fish and Wildlife Service (FWS), was suspended from his job for 30 days because of unauthorized use of a Government vehicle. The United States Court of Appeals for the Federal Circuit held that he could maintain a suit for backpay in the United States Claims Court alleging that his suspension was in violation of Department of the Interior regulations. We granted certiorari to decide whether the Civil Service Reform Act of 1978 (CSRA or Act), Pub. L.

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*Briefs of *amici curiae* urging affirmance were filed for the American Federation of Government Employees, AFL–CIO, by *Mark D. Roth* and *Kevin M. Grile;* and for Joseph D. Finn et al. by *Irving Kator*, *Joseph B. Scott*, and *Michael J. Kator*.

95–454, 92 Stat. 1111 *et seq.* (codified, as amended, in various sections of 5 U. S. C. (1982 ed. and Supp. IV)), which affords an employee in respondent's situation no review of the agency's decision, precludes such a Claims Court suit.

I

Respondent was hired by FWS in January 1978, as an administrative officer for the Young Adult Conservation Corps camp in Virginia Beach, Virginia. His position was in the excepted service,[1] and was to last for the duration of the Conservation Corps program at Virginia Beach, but not beyond September 30, 1982.

In November 1980, FWS advised respondent that it intended to dismiss him for a number of reasons, including unauthorized use of a Government vehicle. After respondent replied to the charges, he received a memorandum from FWS informing him that he would be removed effective January 16, 1981. That memorandum did not advise respondent of his grievance rights under Department of the Interior regulations, which included the right to a formal hearing con-

[1] The CSRA divides civil service employees into three main classifications that can be generally described as follows: "Senior Executive Service" employees are those who occupy high-level positions in the Executive Department, but for whom appointment by the President and confirmation by the Senate is not required. 5 U. S. C. § 3132(a)(2). "Competitive service" employees are all other employees for whom nomination by the President and confirmation by the Senate is not required, and who are not specifically excepted from the competitive service by statute or by statutorily authorized regulation. § 2102. "Excepted service" personnel are the remainder—those who are in neither the competitive service nor the Senior Executive Service. § 2103. Respondent's position was in the excepted service because it had been excluded from the competitive service by authorized Civil Service Commission (now Office of Personnel Management) regulation. 5 CFR § 213.3102(hh) (1978).

Within each of the three classifications of employment, the Act accords preferential treatment to certain veterans and their close relatives—so-called "preference eligibles." § 2108. Respondent, who is not a preference eligible, is referred to as a nonpreference member of the excepted service.

ducted by a grievance examiner. See Department of the Interior Federal Personnel Manual—231, pt. 370 DM, ch. 771, subch. 3, 3.22A (May 4, 1981).[2]

Respondent sought review of his removal with the Merit Systems Protection Board (MSPB), which dismissed his appeal in August 1981, on the ground that under the CSRA a nonpreference eligible in the excepted service has no right to appeal to the MSPB. *Fausto* v. *Department of Interior*, No. PH 075281102271 (M. S. P. B. Aug. 27, 1981), aff'd, 738 F. 2d 454 (CA Fed. 1984) (judgment order). On September 18, 1981, FWS permanently closed the camp at Virginia Beach. In March 1982, in response to an inquiry initiated on behalf of respondent, FWS admitted that respondent had not been informed of his grievance rights, and offered him the opportunity to challenge his removal. Respondent filed a formal grievance, and on June 30, 1982, FWS concluded, based on the administrative file and without a hearing, that respondent should not have been removed. FWS found that most of the charges against respondent were *de minimis* and warranted no penalty, but imposed a 30-day suspension for misuse of a Government vehicle. See 31 U. S. C. § 638a(c)(2) (1976 ed.) (now codified at 31 U. S. C. § 1349(b)). FWS offered respondent backpay from February 15, 1981, the date his 30-day suspension would have ended, through September 18, 1981, the date the camp was closed.

Respondent filed an appeal with the Department of the Interior, claiming that his suspension was unwarranted and that he was entitled to additional backpay for the period covered by the suspension as well as for the period from the date on which the camp closed through the date on which FWS admitted that he should not have been removed. The Secretary of the Interior upheld FWS's decision.

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[2] Both parties have characterized the grievance rights included in the Department of the Interior Federal Personnel Manual as agency regulations. For purposes of this case we assume, without deciding, that they are such.

In February 1983, respondent filed the present action under the Back Pay Act, 5 U. S. C. § 5596, in the Claims Court. The Claims Court dismissed, holding that the CSRA comprised the exclusive catalog of remedies for civil servants affected by adverse personnel action. 7 Cl. Ct. 459, 461 (1985). The Federal Circuit reversed and remanded, 783 F. 2d 1020 (1986), holding that although the CSRA did not afford nonpreference excepted service employees a right of appeal to the MSPB, it did not preclude them from seeking the Claims Court review traditionally available under the Tucker Act, 28 U. S. C. § 1491, based on the Back Pay Act. 783 F. 2d, at 1022–1023. On the merits it found Fausto's suspension wrongful and awarded backpay for the period of the suspension. *Id.*, at 1023–1024. The Court of Appeals denied the Government's petition for rehearing of the case en banc, but issued a second panel opinion reaffirming its decision. 791 F. 2d 1554 (1986).

The Government petitioned for certiorari on the question whether a nonveteran member of the excepted service may obtain, under the Tucker Act, judicial review of adverse personnel action for which the CSRA does not provide him a right of review.

II

We have recognized that the CSRA "comprehensively overhauled the civil service system," *Lindahl* v. *OPM*, 470 U. S. 768, 773 (1985), creating an elaborate "new framework for evaluating adverse personnel actions against [federal employees]," *id.*, at 774. It prescribes in great detail the protections and remedies applicable to such action, including the availability of administrative and judicial review. No provision of the CSRA gives nonpreference members of the excepted service the right to administrative or judicial review of suspension for misconduct. The question we face is whether that withholding of remedy was meant to preclude judicial review for those employees, or rather merely to leave

them free to pursue the remedies that had been available before enactment of the CSRA. The answer is to be found by examining the purpose of the CSRA, the entirety of its text, and the structure of review that it establishes. See *Lindahl*, *supra*, at 779; *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 345 (1984).

A leading purpose of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action, part of the "outdated patchwork of statutes and rules built up over almost a century" that was the civil service system, S. Rep. No. 95–969, p. 3 (1978). Under that pre-existing system, only veterans enjoyed a statutory right to appeal adverse personnel action to the Civil Service Commission (CSC), the predecessor of the MSPB. 5 U. S. C. § 7701 (1976 ed.). Other employees were afforded this type of administrative review by Executive Order. Exec. Order No. 11491, § 22, 3 CFR 874 (1966–1970 Comp.), note following 5 U. S. C. § 7301 (1976 ed.) (extending CSC review to competitive service employees). Still others, like employees in respondent's classification, had no right to such review. As for appeal to the courts: Since there was no special statutory review proceeding relevant to personnel action, see 5 U. S. C. § 703, employees sought to appeal the decisions of the CSC, or the agency decision unreviewed by the CSC, to the district courts through the various forms of action traditionally used for so-called nonstatutory review of agency action, including suits for mandamus, see, *e. g.*, *Taylor* v. *United States Civil Service Comm'n*, 374 F. 2d 466 (CA9 1967), injunction, see, *e. g.*, *Hargett* v. *Summerfield*, 100 U. S. App. D. C. 85, 243 F. 2d 29 (1957), and declaratory judgment, see, *e. g.*, *Camero* v. *McNamara*, 222 F. Supp. 742 (ED Pa. 1963). See generally R. Vaughn, Principles of Civil Service Law § 5.4, p. 5–21, and nn. 13–17 (1976) (collecting cases). For certain kinds of

personnel decisions, federal employees could maintain an action in the Court of Claims of the sort respondent seeks to maintain here. See, *e. g.*, *Ainsworth* v. *United States*, 185 Ct. Cl. 110, 399 F. 2d 176 (1968).

Criticism of this "system" of administrative and judicial review was widespread. The general perception was that "appeals processes [were] so lengthy and complicated that managers [in the civil service] often avoid[ed] taking disciplinary action" against employees even when it was clearly warranted. S. Rep. No. 95–969, at 9. With respect to judicial review in particular, there was dissatisfaction with the "wide variations in the kinds of decisions . . . issued on the same or similar matters," *id.*, at 63, which were the product of concurrent jurisdiction, under various bases of jurisdiction, of the district courts in all Circuits and the Court of Claims. Moreover, as the Court of Appeals for the District of Columbia Circuit repeatedly noted, beginning the judicial process at the district court level, with repetition of essentially the same review on appeal in the court of appeals, was wasteful and irrational. See *Polcover* v. *Secretary of Treasury*, 155 U. S. App. D. C. 338, 341–342, 477 F. 2d 1223, 1226–1228 (1973).

Congress responded to this situation by enacting the CSRA, which replaced the patchwork system with an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration. See S. Rep. No. 95–969, at 4. Three main sections of the CSRA govern personnel action taken against members of the civil service. In each of these sections, Congress deals explicitly with the situation of nonpreference members of the excepted service, granting them limited, and in some cases conditional, rights.

Chapter 43 of the CSRA governs personnel actions based on unacceptable job performance. It applies to both com-

petitive service employees and members of the excepted service. 5 U. S. C. § 4301. It provides that before an employee can be removed or reduced in grade for unacceptable job performance certain procedural protections must be afforded, including 30 days' advance written notice of the proposed action, the right to be represented by an attorney or other representative, a reasonable period of time in which to respond to the charges, and a written decision specifying the instances of unacceptable performance. § 4303(b)(1). Although Congress extended these protections to nonpreference members of the excepted service, it denied them the right to seek either administrative or judicial review of the agency's final action. Chapter 43 gives only competitive service employees and preference eligible members of the excepted service the right to appeal the agency's decision to the MSPB and then to the Federal Circuit. § 4303(e).

Chapter 23 of the CSRA establishes the principles of the merit system of employment, § 2301, and forbids an agency to engage in certain "prohibited personnel practices," including unlawful discrimination, coercion of political activity, nepotism, and reprisal against so-called whistleblowers. § 2302. Nonpreference excepted service employees who are not in positions of a confidential or policymaking nature are protected by this chapter, § 2302(a)(2)(B), and are given the right to file charges of "prohibited personnel practices" with the Office of Special Counsel of the MSPB, whose responsibility it is to investigate the charges and, where appropriate, to seek remedial action from the agency and the MSPB. § 1206.

Chapter 75 of the Act governs adverse action taken against employees for the "efficiency of the service," which includes action of the type taken here, based on misconduct. Subchapter I governs minor adverse action (suspension for 14 days or less), §§ 7501–7504, and Subchapter II governs major

adverse action (removal, suspension for more than 14 days, reduction in grade or pay, or furlough for 30 days or less), §§ 7511–7514. In each subchapter, covered employees are given procedural protections similar to those contained in Chapter 43, §§ 7503(b), 7513(b), and in Subchapter II covered employees are accorded administrative review by the MSPB, followed by judicial review in the Federal Circuit. §§ 7513(d), 7703. The definition of "employee[s]" covered by Subchapter II (major adverse action) specifically includes preference eligibles in the excepted service, § 7511(a)(1)(B), but does not include other members of the excepted service. The Office of Personnel Management is, however, given authority to extend coverage of Subchapter II to positions in the excepted service that have that status because they have been excluded from the competitive service by OPM regulation. § 7511(c).

The Court of Appeals viewed the exclusion of nonpreference members of the excepted service from the definitional sections of Chapter 75 as congressional silence on the issue of what review these employees should receive for the categories of personnel action covered by that chapter, including a suspension of the duration at issue here, which would come within Subchapter II. The court therefore found respondent free to pursue whatever judicial remedies he would have had before enactment of the CSRA. We view the exclusion quite differently. In the context of the entire statutory scheme, we think it displays a clear congressional intent to deny the excluded employees the protections of Chapter 75—including judicial review—for personnel action covered by that chapter.

In *Block* v. *Community Nutrition Institute*, 467 U. S., at 345–348, we observed that, under the Agricultural Marketing Agreement Act of 1937, the omission of review procedures for consumers affected by milk market orders, coupled with

the provision of such procedures for milk handlers so affected, was strong evidence that Congress intended to preclude consumers from obtaining judicial review. Similarly, in *United States* v. *Erika, Inc.*, 456 U. S. 201 (1982), we found that in the context of the "precisely drawn provisions" of the Medicare statute, the provision of judicial review for awards made under Part A of the statute, coupled with the omission of judicial review for awards under Part B, "provides persuasive evidence that Congress deliberately intended to foreclose further review of such claims." *Id.*, at 208 (citations omitted). The same type of analysis applies here. The comprehensive nature of the CSRA, the attention that it gives throughout to the rights of nonpreference excepted service employees, and the fact that it does not include them in provisions for administrative and judicial review contained in Chapter 75, combine to establish a congressional judgment that those employees should not be able to demand judicial review for the type of personnel action covered by that chapter. Their exclusion from the scope of those protections can hardly be explained on the theory that Congress simply did not have them in mind, since, as noted earlier, Congress specifically included in Chapter 75 *preference eligible* excepted service employees, § 7511(a)(1)(B), and specifically provided for optional inclusion (at the election of OPM) of *certain* nonpreference excepted service employees with respect to *certain* protections of the chapter, including MSPB and judicial review, § 7511(c). (Respondent, incidentally, falls within the category eligible for that optional inclusion, see *ibid.*; 5 CFR § 213.3102(hh) (1978), which OPM has chosen not to invoke.) It seems to us evident that the absence of provision for these employees to obtain judicial review is not an uninformative consequence of the limited scope of the statute, but rather manifestation of a considered congressional judgment that they should not have statutory

entitlement to review for adverse action of the type governed by Chapter 75.

This conclusion emerges not only from the statutory language, but also from what we have elsewhere found to be an indicator of nonreviewability, the structure of the statutory scheme. *Block* v. *Community Nutrition Institute*, *supra*, at 345; see *Southern R. Co.* v. *Seaboard Allied Milling Corp.*, 442 U. S. 444, 456–459 (1979). Two structural elements important for present purposes are clear in the framework of the CSRA: First, the preferred position of certain categories of employees—competitive service employees and "preference eligibles" (veterans). See 5 U. S. C. §§ 4303(e), 7501(1), 7503, 7511(a)(1), 7513. This is of course not an innovation of the CSRA, but continuation of a traditional feature of the civil service system. See Veterans Preference Act of 1944, ch. 287, § 14, 58 Stat. 390; Exec. Order No. 10988, § 14, 3 CFR 527 (1959–1963 Comp.). The second structural element is the primacy of the MSPB for administrative resolution of disputes over adverse personnel action, 5 U. S. C. §§ 1205, 4303(e), 7513(d), 7701 (1982 ed. and Supp. IV), and the primacy of the United States Court of Appeals for the Federal Circuit for judicial review, § 7703. This enables the development, through the MSPB, of a unitary and consistent Executive Branch position on matters involving personnel action, avoids an "unnecessary layer of judicial review" in lower federal courts, and "[e]ncourages more consistent judicial decisions . . . ." S. Rep. No. 95–969, at 52; see *Lindahl* v. *OPM*, 470 U. S., at 797–798.

Interpreting the exclusion of nonpreference excepted service personnel from Chapter 75 as leaving them free to pursue other avenues of review would turn the first structural element upside down, and would seriously undermine the second. As to the former: Under respondent's view, he would be able to obtain judicial review of a 10-day suspension for

misconduct, even though a competitive service employee would not, since Chapter 75 makes MSPB review, and hence judicial review, generally unavailable for minor adverse personnel action, including suspensions of less than 14 days.[3] Moreover, this inverted preference shown to nonpreference excepted service employees would be shown as well to probationary employees, another disfavored class. See 5 U. S. C. § 4303(f)(2) (expressly excluding probationary employees from review under Chapter 43); § 7511(a)(1)(A) (expressly excluding probationary employees from Chapter 75); S. Rep. No. 95–969, at 45 ("It is inappropriate to restrict an agency's authority to separate an employee who does not perform acceptably during the [probationary period]"). Since probationary employees, like nonpreference excepted service employees, are excluded from the definition of "employee" for purposes of Chapter 75, respondent's theory that persons so excluded retain their pre-CSRA remedies must apply to them as well. And as it happens, the very case relied upon by the Federal Circuit as demonstrating the pre-CSRA right to Court of Claims review involved a probationary employee. See *Greenway* v. *United States*, 163 Ct. Cl. 72 (1963).[4]

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[3] This assumes, of course, that competitive service employees, who *are* given review rights by Chapter 75, cannot expand these rights by resort to pre-CSRA remedies. Cf. *Pinar* v. *Dole*, 747 F. 2d 899, 910–912 (CA4 1984), cert. denied, 471 U. S. 1016 (1985); *Carducci* v. *Regan*, 230 U. S. App. D. C. 80, 82–84, 714 F. 2d 171, 173–175 (1983). Even respondent has not questioned this assumption.

[4] The dissent makes no attempt to explain these anomalies, except to assert that we have "create[d] from thin air the notion" that the CSRA affords preferred status to competitive service and preference eligible employees. See *post*, at 466. Aside from the obvious linguistic response to this assertion—that the CSRA explicitly draws distinctions between "preference" and nonpreference members of the excepted service, 5 U. S. C. § 7511(a)(1)(B)—we think it sufficient to reiterate that this preferred status is a traditional feature of the civil service system. See *supra*, at 449. This in no way means, of course, that Congress has judged nonpreference excepted service employees to be "less worthy than other federal em-

The manner in which respondent's interpretation would undermine the second structural element of the Act is obvious. First, for random categories of employees, legally enforceable employment entitlements will exist that are not subject to the unifying authority, in consistency of fact-finding as well as interpretation of law, of the MSPB. Second, for these same employees, the second layer of judicial review, which Congress meant to eliminate, would persist, see *Lindahl*, *supra*, at 797–798, since pre-CSRA causes of action had to be commenced in the federal courts of first instance rather than in the courts of appeals. Finally, for certain kinds of actions, these employees would be able to obtain review in the district courts and the regional courts of appeals throughout the country, undermining the consistency of interpretation by the Federal Circuit envisioned by § 7703 of the Act. Although a Tucker Act suit is appealable only to the Federal Circuit, regardless of whether it is brought in the Claims Court or in district court, see 28 U. S. C. §§ 1295(a)(2), 1295(a)(3), 1346(a)(2), actions brought under the other statutes used to obtain judicial review before the CSRA, see *supra*, at 445, would be appealable to the various regional Circuits. When, as would often be the case, particular agency action could be challenged under either the Tucker Act or one of the other bases of jurisdiction, an agency office would not know whether to follow the law of its geographical Circuit or the conflicting law of the Federal Circuit. This, and the other consequences of respondent's theory that the pre-CSRA remedies of nonpreference excepted service employees were not meant to be affected by the Act, are inherently implausible.[5]

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plyees," *post*, at 466, but only that it has chosen to give them less employment protection.

[5] The dissent seeks to minimize the impact of respondent's interpretation by observing that the remedy he seeks will be "limited to those instances when the agency violates its own regulations." *Ibid.* This sounds like a substantial limitation, but is in reality an insignificant one. The De-

Amicus contends that interpreting the CSRA to foreclose review in this case is contrary to two well-established principles of statutory construction. The first is that Congress will be presumed to have intended judicial review of agency action to be available unless there is "persuasive reason" to believe otherwise. *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967). We agree with the principle, but find ample basis for applying the exception it contains. As we have made clear elsewhere, the presumption favoring judicial review is not to be applied in the "strict evidentiary sense," but may be "overcom[e] whenever the congressional intent to preclude review is 'fairly discernible in the statutory scheme.'" *Block* v. *Community Nutrition Institute*, 467 U. S., at 351 (quoting *Data Processing Service* v. *Camp*, 397 U. S. 150, 157 (1970)). Here, as in *Block*, we think Congress' intention is fairly discernible, and that "the presumption favoring judicial review . . . [has been] overcome by inferences of intent drawn from the statutory scheme as a whole." 467 U. S., at 349.

The other principle of statutory construction to which *amicus* appeals is the doctrine that repeals by implication are strongly disfavored, *Rodriguez* v. *United States*, 480 U. S.

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partment of the Interior grievance system that is the subject of this suit not only provides to nonpreference excepted service employees in respondent's position the right to be advised of grievance procedures (which is the precise matter at issue here) but also provides that the grievance will be successful unless "management . . . establish[es] the facts it asserts by a preponderance of evidence demonstrating that its action was for such cause as would promote the efficiency of the service." Department of the Interior Federal Personnel Manual—231, pt. 370 DM, ch. 771, subch. 3, app. A–1(H) (May 4, 1981). Therefore, under respondent's analysis, a nonpreference excepted service employee in his position would be able to appeal to the courts, as a violation of agency regulations, the alleged insufficiency of the evidence to prove the acts for which he was dismissed, and the alleged failure of those acts to establish that his dismissal would promote the efficiency of the service. That would hardly be a narrow supplement to the otherwise integrated system of review established by the CSRA.

522, 524 (1987); *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 133 (1974), so that a later statute will not be held to have implicitly repealed an earlier one unless there is a clear repugnancy between the two, *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 456–457 (1945); *Wood* v. *United States*, 16 Pet. 342, 362–363 (1842). This means, *amicus* asserts, that absent an express statement to the contrary, the CSRA cannot be interpreted to deprive respondent of the the statutory remedy he possessed under the Back Pay Act.

Once again we agree with the principle, but do not find it applicable here. Repeal by implication of an express statutory text is one thing; it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change. See, *e. g.*, *Morton* v. *Mancari*, 417 U. S. 535 (1974) (Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U. S. C. § 2000e *et seq.* (1970 ed., Supp. II), did not negate employment preference for Indians expressly established by the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U. S. C. § 461 *et seq.*). But repeal by implication of a legal disposition implied by a statutory text is something else. The courts frequently find Congress to have done this—whenever, in fact, they interpret a statutory text in the light of surrounding texts that happen to have been subsequently enacted. This classic judicial task of reconciling many laws enacted over time, and getting them to "make sense" in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute. And that is what we have here. By reason of the interpretation we adopt today, the Back Pay Act does not stand repealed, but remains an operative part of the integrated statutory scheme set up by Congress to protect civil servants. All that we find to have been "repealed" by the CSRA is the judicial interpretation of the Back Pay Act—or, if you will, the Back Pay Act's implication—allowing review in the Court of Claims of the underlying personnel decision giving rise to the claim for backpay.

To be more explicit: The Back Pay Act provides in pertinent part:

> "An employee of an agency who, on the basis of a timely appeal or an administrative determination . . . is found *by appropriate authority under applicable law*, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action . . . [is entitled to back pay]." 5 U. S. C. § 5596(b)(1) (emphasis added).

Before enactment of the CSRA, regulations promulgated by the Civil Service Commission provided that a court authorized to correct, or to direct the correction of, an unjustified personnel action was an "appropriate authority" within the meaning of the Back Pay Act. 5 CFR § 550.803(c) (1968). And the Court of Claims had held (with some circularity of reasoning) that it was such a court because it had jurisdiction to award backpay. *Ainsworth* v. *United States*, 185 Ct. Cl., at 118–119, 399 F. 2d, at 181. Without disagreeing with that determination made in the context of the pre-existing patchwork scheme, see *supra*, at 444–445, we find that under the comprehensive and integrated review scheme of the CSRA, the Claims Court (and any other court relying on Tucker Act jurisdiction) is not an "appropriate authority" to review an agency's personnel determination. This does not mean that the statutory remedy provided in the Back Pay Act is eliminated, or even that the conditions for invoking it are in any way altered. Now, as previously, if an employee is found by an "appropriate authority" to have undergone an unwarranted personnel action a suit for backpay will lie. Post-CSRA, such an authority would include the agency itself, or the MSPB or the Federal Circuit where those entities have the authority to review the agency's determination. It seems to us that what respondent would have us invoke is a rule akin to the doctrine that statutes in derogation of the common law will be strictly construed—that is, a presumption against any change rather than a presumption against

implicit repeal of a statute. We decline to embrace that principle.

The CSRA established a comprehensive system for reviewing personnel action taken against federal employees. Its deliberate exclusion of employees in respondent's service category from the provisions establishing administrative and judicial review for personnel action of the sort at issue here prevents respondent from seeking review in the Claims Court under the Back Pay Act. Accordingly, the judgment of the Court of Appeals is

Reversed.

JUSTICE BLACKMUN, concurring.

I join the Court's opinion, because of the persuasive evidence it marshals for the proposition that Congress intended the CSRA to "replac[e] the patchwork system with an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Ante*, at 445. I do not believe, nor do I read the majority opinion to suggest, that our well-established aversion to recognizing "implied" repeals of remedial provisions or of judicial review is any weaker when what is "repealed" finds its source in our cases rather than in specific statutory texts. For example, this Court long has recognized that the Constitution itself supports a private damages action against a federal official, *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), and that the courts' common-law power to vindicate constitutional rights, see *Davis* v. *Passman*, 442 U. S. 228 (1979); *Carlson* v. *Green*, 446 U. S. 14 (1980), is not lightly to be set aside.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Respondent claims that his 30-day suspension was imposed in violation of the procedural regulations of his employing agency and that he is therefore entitled to backpay for that

period. It is undisputed that if his claim had arisen prior to the passage of the Civil Service Reform Act of 1978 (CSRA), and if he had proved his allegations, he could have recovered his backpay in the Court of Claims. It is also undisputed that there is not a single word in either the text or the legislative history of the CSRA that purports to withdraw or curtail any judicial remedy that was previously available to employees like respondent, who do not enjoy the protections accorded to members of the competitive service or those accorded to veterans and their close relatives. It is therefore quite wrong for this Court to supplement that carefully crafted piece of legislation with an unnecessary and unenacted repealer.

To explain my profound disagreement with the Court's nontextual reading of the Act, I shall first comment on the state of the law prior to the enactment of the CSRA and then explain how that statute—whose primary focus is upon employees who are either in the competitive service or are veterans—gave certain new protections to nonpreference eligible members of the excepted service without withdrawing *any* of their pre-existing rights. Finally, I shall comment on certain flaws in the reasoning of the majority.

I

In important respects respondent's case is similar to *Vitarelli* v. *Seaton*, 359 U. S. 535 (1959). In that case, as in this, the Department of the Interior discharged a nontenured employee without following the procedures dictated by the Department's own regulations. In both cases it must be assumed that the employing agency had sufficient grounds for its action because an employee in the excepted service is subject to discharge without cause. As the Court noted in *Vitarelli*, petitioner was a person "who concededly was at no time within the protection of the Civil Service Act, Veterans' Preference Act, or any other statute relating to employment rights of government employees, and who, as a 'Sched-

ule A' employee, could have been summarily discharged by the Secretary at any time without the giving of a reason." *Id.*, at 539. Nevertheless, having "chosen to proceed against petitioner on security grounds, the Secretary . . . was bound by the regulations which he himself had promulgated for dealing with such cases, even though without such regulations he could have discharged petitioner summarily." *Id.*, at 539–540.

In cases following *Vitarelli*, prior to the passage of the CSRA, it was held that a nonpreference eligible excepted service employee could seek a remedy under the Tucker Act and the Back Pay Act in the former Court of Claims[1] if he or she was discharged in violation of applicable agency regulations.[2] See *Batchelor* v. *United States*, 169 Ct. Cl. 180, 184,

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[1]The United States Court of Claims was abolished by the Federal Courts Improvement Act of 1982 (FCIA), Pub. L. 97–164, 96 Stat. 25. The FCIA created in its stead the United States Claims Court, which inherited the Court of Claims' authority to exercise general jurisdiction over Tucker Act claims. *Lindahl* v. *OPM*, 470 U. S. 768, 796 (1985).

[2]The Tucker Act, 28 U. S. C. § 1491(a)(1), provides in pertinent part:

"The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

The Back Pay Act, 5 U. S. C. § 5596(b), provides in pertinent part:

"An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—

"(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—[an amount equal to back pay (less any amount earned through other employment) and reasonable attorney fees]."

As we explained in *United States* v. *Testan*, 424 U. S. 392, 398 (1976), the Tucker Act created jurisdiction in the Court of Claims to consider cer-

cert. denied, 382 U. S. 870 (1965); *Greenway* v. *United States*, 163 Ct. Cl. 72, 76 (1963); cf. *Watson* v. *United States*, 142 Ct. Cl. 749, 162 F. Supp. 755 (1958). In those cases, as in this, there was no judicial review of the merits of the executive decision to remove or suspend the excepted service employee. Such employees did not have, and do not now have, any generalized right to review of the merits of their removal. Tucker Act jurisdiction was limited to those instances in which the agency had violated its own regulations.

In contrast to the limited remedy available to employees like Vitarelli and respondent, employees protected by the Civil Service Act and the Veterans' Preference Act had a variety of administrative and judicial remedies that included a right to review of the merits of adverse personnel actions.[3] Indeed, a concern that those employees had too much protection, as well as dissatisfaction with the fact that the Civil Service Commission had both management and adjudicatory responsibilities, were among the factors that led to the enactment of CSRA. As the Court recognizes, the "general perception was that 'appeals processes [were] so lengthy and complicated that managers [in the civil service] often avoid[ed] taking disciplinary action' against employees even when it was clearly warranted. S. Rep. No. 95–969, at 9." *Ante*, at 445.[4] It is of critical importance to note that the

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tain claims against the United States whenever a substantive right existed. The Back Pay Act supplies the substantive right to recover backpay whenever an employee is affected by an unjustified or unwarranted personnel action which leads to the withdrawal or reduction of pay and allowances. *Id.*, at 406.

[3] The right of preference eligible employees to appeal to the Civil Service Commission was granted by statute, 5 U. S. C. § 7701 (1976 ed.), whereas the rights of competitive service employees were conferred by Executive Order, see Exec. Order No. 11491, § 22, 3 CFR 874 (1966–1970 Comp.). Neither the statute nor the Executive Order applied to nonpreference eligible excepted service employees.

[4] "One of the central tasks of the civil service reform bill is simple to express but difficult to achieve: Allow civil servants to be able to be hired

appeals processes in the Civil Service Commission were not available to nonpreference eligible employees in the excepted service. Their limited right to judicial review of the question whether their employing agency had followed its own procedural regulations was not part of the problem that Congress solved by allocating the management functions of the Civil Service Commission (CSC) to the Office of Personnel Management (OPM) and its adjudicatory functions to the Merit Systems Protection Board (MSPB).

II

When read against its background, the text of the CSRA is readily understood as meaning exactly what it says and no more. Generally, the CSRA merely enacted provisions necessary to achieve the reallocation of CSC functions and codified the protections previously enjoyed by competitive service employees only by virtue of an Executive Order. See n. 3, *supra*. It addresses nonpreference eligible excepted service employees only limitedly, and then only to expand, not to contract, the remedies available to them. Chapter 23 of the Act extends limited protection against prohibited practices (such as retaliatory discharges and discrimination) to nonpreference eligibles in the excepted service, and Chapter 43 extends them certain procedural rights in connection with adverse personnel actions based on poor job performance. In both of these areas, the CSRA grants nonpreference eligible members of the excepted service benefits that they had not previously enjoyed.

Chapters 75 and 77 describe the administrative and judicial procedures that are available to veterans and competitive service employees who are removed for "cause." Since nonpreference eligible members of the excepted service have no job tenure and may be removed without cause, it is perfectly obvious why Congress did not include them within the

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and fired more easily, but for the right reasons." S. Rep. No. 95–969, p. 4 (1978).

coverage of these chapters. It did, however, give the OPM the authority to extend the coverage of Chapter 75 to certain employees in the excepted service. See 5 U. S. C. § 7511(c). Again, however, this is a provision which, if exercised, would provide new protections for nonpreference eligible excepted service personnel.

Not a word in the CSRA suggests that Congress intended to repeal the limited pre-existing judicial remedy for nonpreference eligible excepted service employees.[5] The fact that Congress expressly added to the protections for this class of employees, in light of Congress' presumed familiarity with the established remedy that was already available to them,[6] strongly supports the conclusion that Congress did not intend to repeal that remedy. See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 381–382 (1982). This conclusion is reinforced by the fact that Congress was careful to amend a number of earlier statutes to conform

[5] The language used by Congress to grant those employees covered by Chapter 75 and other chapters of the Act judicial review of adverse MSPB decisions is instructive. Employees who are governed by Chapter 75 have an express right to seek administrative review of adverse personnel decisions before the MSPB. Title 5 U. S. C. § 7703(a)(1) provides that "[a]ny employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision." If, as the majority concludes, Congress intended to bar nonveteran excepted service employees from all judicial review of any adverse personnel action falling within the scope of Chapter 75, one would reasonably have expected Congress to draft § 7703 to read "*only* employees or applicants for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of an adverse personnel action." Such language would have made it clear that Congress intended to limit judicial review to those personnel actions falling within the jurisdiction of the MSPB. However, as actually written, § 7703 merely creates jurisdiction. Nothing in its language or construction even hints at the withdrawal of jurisdiction created elsewhere.

[6] See *Rodriguez* v. *United States*, 480 U. S. 522, 525 (1987) *(per curiam)* (Congress is presumed to act with full awareness of existing judicial interpretations).

them with the CSRA,[7] but did not amend the Back Pay Act or the Tucker Act to limit the nature or scope of relief available under their provisions.[8]

Given the comprehensive nature of the CSRA, it is highly improbable that Congress intended to make any significant changes in the law that are not plainly discernible from the language of the statute. This realistic appraisal of the actual intent of the lawmakers who drafted and enacted the CSRA is given added support by the strong presumption favoring judicial review of administrative action. See *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 670–673 (1986).

III

In my opinion the majority is not faithful to the rule against lightly implying an intent to repeal a previously existing statutory remedy,[9] or to the presumption that agency actions are

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[7] See Technical and Conforming Amendments, Pub. L. 94–454, §§ 703 and 906, 92 Stat. 1216 and 1224.

[8] Congress' failure to so amend the Back Pay Act is especially notable since the Back Pay Act was amended by the CSRA in other respects. The CSRA amendment to the Back Pay Act ensures that unfair labor practice and grievance proceedings are considered administrative proceedings, specifies the particular items recoverable as backpay by a prevailing employee (pay, allowances, and differentials plus interest, and attorney's fees and costs), and provides procedures for restoring annual leave, but does not purport to limit the class of employees entitled to obtain this relief. See H. R. Rep. No. 95–1403, pp. 60–61 (1978); n. 2, *supra*. The amendment contains no language supporting the majority's conclusion that the words "appropriate authority" in the Act were implicitly amended by the CSRA to exclude courts relying on Tucker Act jurisdiction.

[9] See *Rodriguez* v. *United States*, 480 U. S., at 524 (1987) (repeals by implication are not favored and will not be found unless an intent to repeal is clear and manifest); *Randall* v. *Loftsgaarden*, 478 U. S. 647, 661 (1986) ("'"[I]t is . . . a cardinal principle of statutory construction that repeals by implication are not favored,"'" quoting *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148, 154 (1976), in turn quoting *United States* v. *United Continental Tuna Corp.*, 425 U. S. 164, 168 (1976)); *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1017–1018 (1984) ("[R]epeals by implication are disfavored" and "where two statutes are capable of co-existence, it is the duty

subject to judicial review. The majority finds within the CSRA, a statute that generally broadens the rights of federal employees, an intention to eliminate judicial review of the

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of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective").

Monsanto concerned the constitutionality of certain provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U. S. C. § 136 *et seq.* One of the challenged provisions provided that a party who submitted data to the Environmental Protection Agency as part of the process of registering a product could lose its right to compensation for the public use of those data if it failed to participate in proceedings to reach agreement as to the amount of compensation due or to comply with the terms of such an agreement. See § 136a(c)(1)(D)(ii). Rejecting an allegation that this provision evidenced an intent to repeal the Tucker Act remedy that ordinarily was available for a taking without just compensation, we reiterated that repeals by implication are not favored and reasserted that whenever two statutes were capable of coexistence, it was our duty, "absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Monsanto*, 467 U. S., at 1018. We reached the conclusion that no repeal of Tucker Act jurisdiction was intended even though we had to imply a requirement that remedies under FIFRA be exhausted before Tucker Act relief was sought to reconcile the two statutes. *Ibid.*

The reasoning we applied in *Monsanto* applies with even more force here. The CSRA and the Tucker Act coexist easily. Allowing nonpreference eligible excepted service employees to pursue a remedy under the Tucker Act in no way interferes with the operation of the CSRA. No judicially created exhaustion requirement or other gap-filling measure is necessary to the harmonious operation of the two statutes. See *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U. S. 772, 788 (1981) (the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable).

There is an unacknowledged danger in the majority's failure to accord the presumption against implied repeals the weight it has enjoyed in previous decisions of this Court. The presumption disfavoring implied repeals has been a part of this Court's jurisprudence at least since 1842. See *Wood* v. *United States*, 16 Pet. 342, 362–363 (1842) (repeal to be implied only if there is a "positive repugnancy" between the old law and the new); *Daviess* v. *Fairbairn*, 3 How. 636, 648 (1845) ("Virtual repeals are not favoured by courts"); *United States* v. *Tynen*, 11 Wall. 88, 92 (1871) ("[I]t is a familiar doctrine that repeals by implication are not favored"). It is a

procedural regularity of agency actions that may affect thousands of federal workers.[10] To support this remarkable conclusion, the majority places primary reliance on our decisions in *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 345–348 (1984), and *United States* v. *Erika, Inc.*, 456 U. S. 201 (1982). But this reliance extends these cases beyond their intended scope and gives them weight they cannot bear. As the Federal Circuit noted in its decision:

> "In both *Community Nutrition* and *Erika* there was no jurisdiction because the very statute asserted to provide the substantive right relied on was instead interpreted to prohibit judicial review of its own provisions. The Court did not hold in either case that the relevant statute had repealed a substantive right granted in a dif-

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firmly entrenched part of the legal landscape against which Congress works. We can presume with certainty that Congress is aware of this longstanding presumption and that Congress relies on it in drafting legislation. Necessarily, we must presume that Congress drafted the CSRA in the context of our assurances that the Act's language would not lightly be found to repeal existing statutes. Changing the weight to be accorded this presumption alters the legal landscape. If we construe a statute in a different legal environment than that in which Congress operated when it drafted and enacted the statute, we significantly increase the risk that we will reach an erroneous interpretation. This danger further enhances the need for us to be faithful to our duty to read statutes consistently whenever possible and to find repeals by implication only when differences between earlier and later enactments are irreconcilable.

[10] It is remarkable that the majority finds this intention sufficiently well expressed in congressional silence to overcome a presumption that can be rebutted only by "clear and convincing evidence" that Congress intended to deny judicial review. *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 141 (1967). To meet this standard, congressional intent must be fairly discernible in the statutory scheme. *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 351 (1984). Even when "substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." *Ibid.* There simply does not exist in the legislative history or text of the CSRA clear and convincing evidence that Congress intended despite its silence to effect a repeal of Tucker Act jurisdiction.

ferent statute. It is essential to a proper understanding of this case to recognize that the issue is *not* whether the CSRA *authorizes* judicial review for persons in the excepted service. The issue is *not* whether persons in the excepted service are entitled to the protection afforded other federal workers by the CSRA. The issue is *not* whether the CSRA grants persons in the excepted service some kind of private right of action. Fausto makes no claim of entitlement under the CSRA and we do not resolve that issue in this case. The issue in this case is whether one act of Congress, the CSRA, has silently repealed other acts of Congress, the Tucker Act and the Back Pay Act. The government asserts that it has. But its arguments, though appearing persuasive, are superficial and fail to directly address the issue. The thrust of its arguments, of its authority in the Supreme Court and in this circuit and in the other circuits, is that persons in the excepted service have no cause of action under the provisions of the CSRA and in that sense the CSRA does not authorize suit; that is to say, the government explains, the CSRA 'precludes' judicial review and therefore, the government concludes, the CSRA bars judicial review under any basis in any forum.

"Again, that is *not* the situation here. Whether the CSRA provides a basis for a cause of action for, or whether the CSRA instead precludes judicial review of, issues which the CSRA does cover is not at all the issue here. Neither *Community Nutrition* nor *Erika* supports the proposition that omission of any mention of an issue in one statute operates to repeal the grant of judicial review of that issue contained in a different statute." 791 F. 2d 1554, 1557–1558 (1986).[11]

[11] The Federal Circuit concluded on initial review and after rehearing that prior to the passage of the CSRA a nonpreference eligible employee had a cause of action under the Tucker Act and the Back Pay Act if he or she was discharged in violation of applicable agency regulations and that

The majority also draws assurance as to Congress' intent from the "structure of the statutory scheme," but this likewise lends no support to the majority's conclusions. Not surprisingly, the CSRA generally provides for review of an adverse personnel action by the Merit Systems Protection Board only when such review is necessary to protect the system of hiring and promoting federal employees on the basis of merit.[12] By definition, see *ante*, at 441, n. 1, employees in the excepted service are not part of the system of merit-based hirings and promotions.[13] Thus, their general exclusion from the protection of the MSPB is quite understand-

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Congress did not destroy this cause of action when it enacted the CSRA. 791 F. 2d 1554 (1986); 783 F. 2d 1020 (1986). Because of the unique character of the Federal Circuit, its conclusions are entitled to special deference by this Court.

The United States Court of Appeals for the Federal Circuit was created by the Federal Courts Improvement Act of 1982, Pub. L. 97–164, § 101, 96 Stat. 25. It is the only Federal Court of Appeals whose jurisdiction is "defined in terms of subject matter rather than geography." S. Rep. No. 97–275, p. 3 (1981). Because its jurisdiction is confined to a defined range of subjects, the Federal Circuit brings to the cases before it an unusual expertise that should not lightly be disregarded.

The Federal Circuit is the only Court of Appeals with jurisdiction to review cases on appeal from the Merit Systems Protection Board and the United States Claims Court. In consequence, all claims by federal employees brought under the CSRA or the Tucker Act/Back Pay Act will ultimately be subject to review by the Federal Circuit. The Federal Circuit's exclusive jurisdiction in this area renders it uniquely qualified to determine whether the CSRA implicitly works a partial repeal of Tucker Act/Back Pay Act jurisdiction.

[12] "The Merit Systems Protection Board, along with its Special Counsel, is made responsible for safeguarding the effective operation of the merit principles in practice." S. Rep. No. 95–969, at 6.

[13] Throughout the CSRA, preference eligible excepted service employees, that is, veterans and some close relatives of veterans, are given for policy reasons the same protections as members of the competitive service. See H. R. Rep. No. 95–1403, at 8 ("[V]eterans' preference laws [are] a benefit which the Government bestowed and should continue to bestow on its citizens who have served in the armed services during a period of war or armed conflict").

able. Since the availability of judicial review under the Act is tied to initial review by the MSPB, 5 U. S. C. § 7703(a)(1), the CSRA does not provide any means by which a nonpreference eligible excepted service employee may seek judicial review. Thus, the failure to provide an avenue of judicial review for nonpreference eligible excepted service employees within the CSRA is not a *preclusion* of such review in all contexts, rather it is merely the consequence of the fact that actions against persons who are not in the competitive service do not pose a threat to the merit protection system. The converse is also true; permitting nonpreference eligible excepted service employees to seek review of adverse agency decisions under the Tucker Act poses no harm to the merit protection system.

The majority argues that allowing nonpreference eligible excepted service employees to obtain judicial review under the Tucker Act would turn "upside down" and "seriously undermine" structural elements of the CSRA. *Ante*, at 449. The majority creates from thin air the notion that the CSRA was designed to create a primacy of competitive service employees and preference eligible excepted service employees over nonpreference eligible excepted service employees. As explained above, nonpreference eligible excepted service employees receive limited treatment in the CSRA not because Congress saw them as less worthy than other federal employees, but because actions affecting them could have little effect on the merit protection system the CSRA was designed to protect. The majority simply overlooks the narrow scope of the remedy available under the Tucker Act. It bears repeating that nonpreference eligible excepted service employees do not have, and have never had, a generalized right to challenge their removals under the Tucker Act. *Batchelor* v. *United States*, 169 Ct. Cl., at 183; *Greenway* v. *United States*, 163 Ct. Cl., at 75. Tucker Act jurisdiction was and remains limited to those instances when the agency violates its own regulations in discharging an employee. Making a

remedy this narrowly drawn available to employees not covered by the MSPB poses no threat to the structural integrity of the MSPB.

The majority claims that permitting nonpreference eligibles to pursue this remedy would give such employees an advantage over preference eligibles and competitive service employees. Quite the contrary. To proceed under the Tucker Act, a nonpreference eligible excepted service employee must be prepared to develop the facts relevant to his or her claim at a formal trial. An employee who is entitled to seek relief before the MSPB will have the opportunity to proceed in a far less formal atmosphere, without paying filing fees and other costs. Because the proceedings are less formal, the employee may be able to present his or her case competently without the assistance of an attorney. Also, the CSRA requires that review by the MSPB be provided expeditiously, 5 U. S. C. § 7701(i)(1); an employee entitled to proceed before the Board may therefore anticipate obtaining relief in a much shorter period of time than an employee who must file a complaint with the Claims Court. The difference in the burdens of proof in the two schemes also favors the employee with a right to seek MSPB review. An employee who brings a Tucker Act claim must prove by a preponderence of the evidence that the agency violated its own regulations. In proceedings before the MSPB, however, the agency has the burden of proving that its actions are supported by a preponderance of the evidence, 5 U. S. C. § 7701(c)(1)(B), and in some instances by substantial evidence, § 7701(c)(1)(A). Most importantly, an employee entitled to seek relief before the MSPB may obtain judicial review of the *merits* of an adverse personnel action, while a nonpreference eligible excepted service employee proceeding under the Tucker Act is entitled to judicial review only of whether the agency violated its own regulations. Given the advantages that attend review by the MSPB, it is clear that pursuit of a Tucker Act claim is not the more favored route.

Contrary to the majority's view, holding that a Tucker Act remedy survived the enactment of the CSRA would not impair the congressional goal of "[e]ncourag[ing] more consistent judicial decisions on review." The majority reads into the desire to "encourage" uniformity a command to guarantee it. However, the precatory words Congress chose describe only a desire to encourage or promote uniformity, nothing more. As originally enacted, § 205 of the CSRA achieved this congressional goal by eliminating review by United States district courts, not by limiting the number of courts of appeals that had jurisdiction to review appeals from the MSPB.[14] In 1982 Congress amended § 205 to limit review of MSPB decisions to the United States Court of Appeals for the Federal Circuit. 5 U. S. C. § 7703(b)(1). Any goal Congress sought to achieve in making this change is not frustrated by continuing to recognize jurisdiction under the Tucker Act since Tucker Act suits are also appealable only to the Federal Circuit. See n. 11, *supra*.

In essence, the majority relies on the bare fact that Congress provided for review of some adverse personnel actions through the MSPB to infer a congressional desire to preclude judicial review of other actions. But congressional silence surely does not provide the clear and convincing evidence of intent we have previously demanded before finding that an existing statutory remedy has been repealed. I respectfully dissent.

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[14] Section 205 of the CSRA, Pub. L. 95–454, 92 Stat. 1143, originally provided:

"Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the Court of Claims or a United States court of appeals as provided in chapters 91 and 158, respectively, of title 28."

Thus appeals from the MSPB could be heard by the Court of Claims pursuant to the Tucker Act, 28 U. S. C. § 1491, or by any court of appeals pursuant to 28 U. S. C. §§ 2342 and 2344. The original form of § 205 demonstrates that Congress did not intend to achieve uniformity at the expense of limiting the scope of Tucker Act jurisdiction.

PHILLIPS PETROLEUM CO. ET AL. *v.* MISSISSIPPI ET AL.

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

No. 86–870. Argued November 9, 1987—Decided February 23, 1988

Petitioners hold record title to 42 acres of Mississippi land underlying a bayou and a number of streams, which, although several miles north of the Gulf Coast and nonnavigable, are nonetheless influenced by the tide since they are adjacent and tributary to a navigable river flowing into the Gulf of Mexico that is affected by the tide's ebb and flow. Petitioners brought a quiet title suit after the State issued oil and gas leases for the property in question on the theory that it had acquired at the time of statehood and held in public trust all land lying under any waters influenced by the tide, whether navigable or not. The State Supreme Court affirmed the Chancery Court's decision finding that the State had fee simple title to the property, rejecting petitioners' contention that the State had acquired title only to lands under navigable waters.

Held:

1. Since the States, upon entering the Union, were given ownership over all lands beneath waters subject to the tide's influence—see, *e. g.*, *Shively* v. *Bowlby*, 152 U. S. 1; *Knight* v. *United States Land Assn.*, 142 U. S. 161—the lands at issue passed to Mississippi at the time of statehood, even though the waters under which they lay were not navigable in fact. Pp. 473–481.

(a) Petitioners' contention that, under the English common-law rule, the Crown's ownership of lands beneath tidewaters actually rested on the navigability of those waters rather than the ebb and flow of the tide, is not persuasive, since the cases relied on by petitioners did not deal with tidal, nonnavigable waters, while *Shivley* v. *Bowlby*, *supra*, and its progeny, clearly establish how this Court has interpreted the common law. Although none of the latter cases actually dealt with lands such as those involved here, this Court has never suggested that its rule that the States owned all the soil beneath waters affected by the tide was anything less than an accurate description of the governing law. Pp. 477–478.

(b) Petitioners' contention that subsequent cases from this Court developing the *American* public trust doctrine make it clear that navigability—and not tidal influence—has become the *sine qua non* of the public trust interest in tidelands in this country, is also not persuasive. Although *The Propeller Genesee Chief* v. *Fitzhugh*, 12 How. 443, and

Barney v. *Keokuk*, 94 U. S. 324, did extend admiralty jurisdiction and public trust doctrine to navigable freshwaters and the lands beneath them, those cases did not simultaneously withdraw from public trust coverage the lands beneath waters influenced by the ebb and flow of the tide which had been consistently recognized by this Court as being within the doctrine's scope. Pp. 478–480.

(c) Petitioners' position is weakened by their concession that the States own the nonnavigable tidelands bordering the oceans, bays, and estuaries. While it is obvious that these waters are part of the sea, and that the lands beneath them are state property, ultimately, the only proof of this fact can be that the waters are influenced by the ebb and flow of the tide. Moreover, although there is a difference in degree between the waters in this case, and nonnavigable seashore waters that are affected by the tide, there is no difference in kind since both types of waters are connected to the sea and share those geographical, chemical, and environmental qualities that make lands beneath tidal waters unique. The ebb-and-flow rule has the benefit of uniformity, certainty, and ease of application, and will not be abandoned now, after its lengthy history, in favor of one of the unpersuasive and unsatisfactory alternatives offered by petitioners. Pp. 480–481.

2. The contention that the State Supreme Court's decision is inequitable and would upset various kinds of property expectations and interests which have matured since the State joined the Union is without merit. By consistently holding that the public trust in lands under water includes "title to all land under tidewater," and by describing uses of such lands not related to navigability, Mississippi cases have clearly and unequivocally indicated the State's claims to tidelands, whether navigable or not, such that any contrary expectations cannot be considered reasonable. Affirming the judgment below will not upset land titles in all coastal States, as petitioners contend, but will simply confirm prevailing ownership rights both in States having the same rule as Mississippi and in other States that have granted all or a portion of their tidelands to adjacent upland property owners. Indeed, it would be far more upsetting to settled expectations to reverse on the ground that the scope of the public trust is limited to lands beneath navigable tidal waters, since many lands titles, interests, and rights have been created on the basis of the ebb-and-flow rule. The fact that petitioners have long been the record titleholders, or paid taxes on the lands in question, cannot divest the State of its ownership, since the State Supreme Court held that, under Mississippi law, the State's ownership could not be lost via adverse possession, laches, or any other equitable doctrine. There is no reason here to set aside the general principle ceding the development

and administration of real property law to the individual States. Pp. 481–484.

491 So. 2d 508, affirmed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, MARSHALL, and BLACKMUN, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which STEVENS and SCALIA, JJ., joined, *post*, p. 485. KENNEDY, J., took no part in the consideration or decision of the case.

Eugene Gressman argued the cause for petitioners. With him on the briefs were *Joel Blass*, *William G. Paul*, *John L. Williford*, and *Elizabeth A. Harris*.

Kathy D. Sones, Special Assistant Attorney General of Mississippi, argued the cause for respondents. With her on the brief were *Edwin Lloyd Pittman*, Attorney General, *Robert Franklin Spencer*, Assistant Attorney General, and *Jean R. Swift*. *Charles Ed Harper* and *Boyce Holleman* filed a brief for respondent Saga Petroleum U. S. Inc.*

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*Briefs of *amici curiae* urging reversal were filed for the American Land Title Association by *Louis F. Claiborne*, *Edgar B. Washburn*, and *Sean McCarthy*; for the city of Elizabeth, New Jersey, et al. by *John R. Weigel*; and for Robert E. Longino, Jr., by *Robert S. Marsel*.

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *John K. Van de Kamp*, Attorney General of California, *Andrea Sheridan Ordin*, Chief Assistant Attorney General, *N. Gregory Taylor*, Assistant Attorney General, *Jan Stevens*, Supervising Deputy Attorney General, and *Michael L. Crow*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Don Siegelman*, of Alabama, *Grace Berg Schaible*, of Alaska, *Robert K. Corbin*, of Arizona, *Robert A. Butterworth*, of Florida, *Warren Price III*, of Hawaii, *William J. Guste, Jr.*, of Louisiana, *Lacy H. Thornburg*, of North Carolina, *Dave Frohnmayer*, of Oregon, *Jim Mattox*, of Texas, *Kenneth O. Eikenberry*, of Washington; and for the 13 Original States by *David C. Slade*, and by the Attorneys General of their respective States as follows: *Joseph I. Lieberman* of Connecticut, *Charles M. Oberly III* of Delaware, *Michael J. Bowers* of Georgia, *J. Joseph Curran* of Maryland, *James M. Shannon* of Massachusetts, *Stephen E. Merrill* of New Hampshire, *W. Cary Edwards* of New Jersey, *Robert Abrams* of New York, *James G. Martin, Jr.*, of North Carolina, *LeRoy S. Zimmerman* of Pennsylvania,

JUSTICE WHITE delivered the opinion of the Court.

The issue here is whether the State of Mississippi, when it entered the Union in 1817, took title to lands lying under waters that were influenced by the tide running in the Gulf of Mexico, but were not navigable in fact.

I

As the Mississippi Supreme Court eloquently put it: "Though great public interests and neither insignificant nor illegitimate private interests are present and in conflict, this in the end is a title suit." *Cinque Bambini Partnership* v. *State*, 491 So. 2d 508, 510 (1986). More specifically, in question here is ownership of 42 acres of land underlying the north branch of Bayou LaCroix and 11 small drainage streams in southwestern Mississippi; the disputed tracts range from under one-half acre to almost 10 acres in size. Although the waters over these lands lie several miles north of the Mississippi Gulf Coast and are not navigable, they are nonetheless influenced by the tide, because they are adjacent and tributary to the Jourdan River, a navigable stream flowing into the Gulf. The Jourdan, in the area involved here, is affected by the ebb and flow of the tide. Record title to these tracts of land is held by petitioners, who trace their claims back to prestatehood Spanish land grants.

The State of Mississippi, however, claiming that by virtue of the "equal-footing doctrine" it acquired at the time of statehood and held in public trust all land lying under any waters influenced by the tide, whether navigable or not, issued oil and gas leases that included the property at issue. This quiet title suit, brought by petitioners, ensued.

The Mississippi Supreme Court, affirming the Chancery Court with respect to the lands at issue here,[1] held that by

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James E. O'Neil of Rhode Island, *T. Travis Medlock* of South Carolina, and *Mary Sue Terry* of Virginia.

[1] The Chancery Court had held that 140 acres of the lands claimed by petitioners were public trust lands. The Mississippi Supreme Court re-

virtue of becoming a State, Mississippi acquired "fee simple title to all lands naturally subject to tidal influence, inland to today's mean high water mark . . . ." *Ibid.* Petitioners' submission that the State acquired title to only lands under navigable waters was rejected.

We granted certiorari to review the Mississippi Supreme Court's decision, 479 U. S. 1084 (1987), and now affirm the judgment below.

II

As petitioners recognize, the "seminal case in American public trust jurisprudence is *Shively* v. *Bowlby*, 152 U. S. 1 (1894)." Reply Brief for Petitioners 11. The issue in *Shively* v. *Bowlby*, 152 U. S. 1 (1894), was whether the State of Oregon or a prestatehood grantee from the United States of riparian lands near the mouth of the Columbia River at Astoria, Oregon, owned the soil below the high-water mark. Following an extensive survey of this Court's prior cases, the English common law, and various cases from the state courts, the Court concluded:

> "At common law, the title and dominion in lands flowed by the tide water were in the King for the benefit of the nation. . . . Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to

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versed with respect to 98 of these 140 acres, finding that these tracts were artificially created tidelands (caused by road construction), and therefore were not part of the public trust created in 1817. Since these lands were neither tidelands in 1817, nor were they added to the tidelands by virtue of natural forces of accretion, they belonged to their record titleholders. 491 So. 2d, at 520.

Because the State did not cross-petition, this portion of the Mississippi Supreme Court's decision is not before us. The only issue presented here is title to the 42 acres which the Mississippi Supreme Court found to be public trust lands.

> the rights surrendered by the Constitution of the United States.
>
> . . . . .
>
> "The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions." *Id.*, at 57.

Shively rested on prior decisions of this Court, which had included similar, sweeping statements of States' dominion over lands beneath tidal waters. *Knight* v. *United States Land Association*, 142 U. S. 161, 183 (1891), for example, had stated that "[i]t is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several States, and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders." On many occasions, before and since, this Court has stated or restated these words from *Knight* and *Shively*.[2]

Against this array of cases, it is not surprising that Mississippi claims ownership of all of the tidelands in the State. Other States have done as much.[3] The 13 original States,

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[2] *E. g.*, *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U. S. 10, 15 (1935); *Appleby* v. *City of New York*, 271 U. S. 364, 381 (1926); *Illinois Central R. Co.* v. *Illinois*, 146 U. S. 387, 435 (1892); *Hardin* v. *Jordan*, 140 U. S. 371, 381 (1891); *McCready* v. *Virginia*, 94 U. S. 391, 394 (1877); *Weber* v. *Harbor Comm'rs*, 18 Wall. 57, 65 (1873); *Goodtitle* v. *Kibbe*, 9 How. 471, 477–478 (1850).

[3] See, *e. g.*, *Wright* v. *Seymour*, 69 Cal. 122, 123–127, 10 P. 323, 324–326 (1886), which held that the State of California owned the bottom of the Russian River as far as the tide affected it, even where the River was not navigable in fact.

Earlier, the Connecticut Supreme Court had held that the tidal flats adjoining an arm of the sea were in public ownership. *Simons* v. *French*, 25 Conn. 346, 352–353 (1856). The South Carolina Supreme Court reached a similar conclusion concerning "salt marshes." *State* v. *Pinckney*, 22 S. C.

joined by the Coastal States Organization (representing all coastal States), have filed a brief in support of Mississippi, insisting that ownership of thousands of acres of tidelands under nonnavigable waters would not be disturbed if the judgment below were affirmed, as it would be if petitioners' navigability-in-fact test were adopted. See Brief for 13 Original States as *Amici Curiae* 3–5, 26–27.

Petitioners rely on early state cases to indicate that the original States did not claim title to nonnavigable tidal waters. See Brief for Petitioners 23–29. But it has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit. *Shively* v. *Bowlby*, *supra*, at 26. Some of the original States, for example, did recognize more private interests in tidelands than did others of the 13—more private interests than were recognized at common law, or in the dictates of our public trusts cases. See n. 12, *infra*. Because some of the cases which petitioners cite come from such States (*i. e.*, from States which abandoned the common law with respect to tidelands),[4] they are of only limited value in understanding

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484, 507–509 (1885). Both of these cases, and many others like them, recognize state dominion over lands beneath nonnavigable tidal waters.

[4]See, *e. g.*, *Rowe* v. *Granite Bridge Corp.*, 38 Mass. 344, 347 (1838); *Commonwealth* v. *Charlestown*, 18 Mass. 180, 185–186 (1822). Massachusetts abrogated the common law for tidelands in 1641. See *Shively* v. *Bowlby*, 152 U. S. 1, 18–19 (1894); *Storer* v. *Freeman*, 6 Mass. 435, 437–439 (1810).

Petitioners also rely quite heavily on two Connecticut cases, *Groton* v. *Hurlburt*, 22 Conn. 178, 185 (1852), and *Wethersfield* v. *Humphrey*, 20 Conn. 218, 227 (1850). See Brief for Petitioners 27. However, we think these cases are inapposite. *Groton* merely held that the erection of a highway over a tidally influenced, but not commercially navigable, creek did not offend federal control over navigable waterways (and did not require a special grant of power under state law). 22 Conn., at 185–189. The decision's interest in the navigability of the creek, therefore, is unremarkable. Moreover, the *Groton* decision noted that construction of the highway put the lands to a publicly beneficial use, and that any navigation of the creek

the public trust doctrine and its scope in those States which have not relinquished their claims to all lands beneath tidal waters.

Finally, we note that several of our prior decisions have recognized that the States have interests in lands beneath tidal waters which have nothing to do with navigation. For example, this Court has previously observed that public trust lands may be used for fishing—for both "shell-fish [and] floating fish." See, *e. g.*, *Smith* v. *Maryland*, 18 How. 71, 75 (1855). On several occasions the Court has recognized that lands beneath tidal waters may be reclaimed to create land for urban expansion. *E. g.*, *Hardin* v. *Jordan*, 140 U. S. 371, 381–382 (1891); *Den* v. *Jersey Co.*, 15 How. 426, 432 (1854). Because of the State's ownership of tidelands, restrictions on the planting and harvesting of oysters there have been upheld. *McCready* v. *Virginia*, 94 U. S. 391, 395–397 (1877).[5] It would be odd to acknowledge such diverse uses of public trust tidelands, and then suggest that the sole measure of the expanse of such lands is the navigability of the waters over them.

Consequently, we reaffirm our longstanding precedents which hold that the States, upon entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide. Under the well-established principles of our cases, the decision of the Mississippi Supreme Court is clearly correct: the lands at issue here are "under tidewaters," and therefore passed to the State of Mississippi upon its entrance into the Union.

III

Petitioners do not deny that broad statements of public trust dominion over tidelands have been included in this

(by small boats or skiffs) was not impaired by the construction. *Id.*, at 187–189. The decision in *Wethersfield* involved similar considerations. 20 Conn., at 227.

[5] These cases lead us to reject the dissent's assertion that "the fundamental purpose of the public trust is to protect commerce," *post*, at 488.

Court's opinions since the early 19th century.[6] Rather, they advance two reasons why these previous statements of the public trust doctrine should not be given their apparent application in this case.

A

First, petitioners contend that these sweeping statements of state dominion over tidelands arise from an oddity of the common law, or more specifically, of English geography. Petitioners submit that in England practically all navigable rivers are influenced by the tide. Brief for Petitioners 19. See *The Propeller Genesee Chief* v. *Fitzhugh*, 12 How. 443, 454 (1852). Thus, "tidewater" and "navigability" were synonyms at common law. See *Illinois Central R. Co.* v. *Illinois*, 146 U. S. 387, 436 (1892). Consequently, in petitioners' view, the Crown's ownership of lands beneath tidewaters actually rested on the navigability of those waters rather than the ebb and flow of the tide. Cf. *ibid.* English authority and commentators are cited to show that the Crown did not own the soil under any nonnavigable waters.[7] Petition-

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[6] We reject petitioners' contention that our cases concerning "tidelands" are not applicable here because the term "tidelands" includes only shorelands or those lands beneath tidal waters which are immediately adjacent to the sea. Reply Brief for Petitioners 14–17. We find no basis for petitioners' restriction of this term from its more common meaning, *i. e.*, that "tidelands" are lands "over which the tide ebbs and flows . . . land as is affected by the tide." Black's Law Dictionary 1329 (5th ed. 1979).

Furthermore, we note that this Court previously rejected a similar contention almost a century ago. See *Mann* v. *Tacoma Land Co.*, 153 U. S. 273, 278, 283 (1894).

[7] See Brief for Petitioners 19–22 (citing, *e. g.*, *Mayor of Lynn* v. *Turner*, 1 Cowp. 86, 98 Eng. Rep. 980, 981 (K. B. 1774); M. Hale, De Jure Maris et Brachiorum ejusdem, cap. iii (1667), reprinted in R. Hall, Essay on the Rights of the Crown and the Privileges of the Subject in the Sea Shores of the Realm, App. v (2d ed. 1875).

As we note in the text, *infra*, at 478, we do not intend to get involved in the historical debate over what the English common law was with respect to nonnavigable tidal streams, if any such law existed—our concern is with how that law was understood and applied by this Court in its cases.

ers also cite for support statements from this Court's opinions, such as *The Genesee Chief, supra,* and *Martin* v. *Waddell,* 16 Pet. 367, 413–414 (1842), which observed that it was "the *navigable* waters of England, and the soils under them, [which were] held by the Crown" at common law (emphasis added).

The cases relied on by petitioners, however, did not deal with tidal, nonnavigable waters. And we will not now enter the debate on what the English law *was* with respect to the land under such waters, for it is perfectly clear how this Court understood the common law of royal ownership, and what the Court considered the rights of the original and the later entering States to be. As we discuss above, this Court has consistently interpreted the common law as providing that the lands beneath waters under tidal influence were given States upon their admission into the Union. See *Shively* v. *Bowlby,* 152 U. S., at 57. See also cases cited in n. 2, *supra.* It is true that none of these cases actually dealt with lands such as those involved in this case, but it has never been suggested in any of this Court's prior decisions that the many statements included therein—to the effect that the States owned all the soil beneath waters affected by the tide—were anything less than an accurate description of the governing law.

B

Petitioners, in a related argument, contend that even if the common law does not support their position, subsequent cases from this Court developing the *American* public trust doctrine make it clear that navigability—and not tidal influence—has become the *sine qua non* of the public trust interest in tidelands in this country.

It is true that *The Genesee Chief, supra,* at 456–457, overruled prior cases of this Court which had limited admiralty jurisdiction to waters subject to tidal influence. Cf. *The Thomas Jefferson,* 10 Wheat. 428, 429 (1825). The Court did sharply criticize the "ebb and flow" measure of admiralty

inherited from England in *The Genesee Chief*, and instead insisted quite emphatically that the different topography of America—in particular, our "thousands of miles of public navigable water[s] . . . in which there is no tide"—required that "jurisdiction [be] made to depend upon the navigable character of the water, and not upon the ebb and flow of the tide." 12 How., at 457. Later, it came to be recognized as the "settled law of this country" that the lands under navigable freshwater lakes and rivers were within the public trust given the new States upon their entry into the Union, subject to the federal navigation easement and the power of Congress to control navigation on those streams under the Commerce Clause. *Barney* v. *Keokuk*, 94 U. S. 324, 338 (1877). See also *Illinois Central R. Co.* v. *Illinois*, *supra*, at 435–436.

That States own freshwater river bottoms as far as the rivers are navigable, however, does not indicate that navigability is or was the prevailing test for state dominion over tidelands. Rather, this rule represents the American decision to depart from what it understood to be the English rule limiting Crown ownership to the soil under tidal waters. In *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U. S. 363, 374 (1977), after recognizing the accepted doctrine that States coming into the Union had title to all lands under the tidewaters, the Court stated that *Barney* v. *Keokuk*, *supra*, had "extended the doctrine to waters which were nontidal but nevertheless navigable, consistent with [the Court's] earlier extension of admiralty jurisdiction."

This Court's decisions in *The Genesee Chief* and *Barney* v. *Keokuk* extended admiralty jurisdiction and public trust doctrine to navigable freshwaters and the lands beneath them. But we do not read those cases as simultaneously withdrawing from public trust coverage those lands which had been consistently recognized in this Court's cases as being within that doctrine's scope: *all* lands beneath waters influenced by

the ebb and flow of the tide. See *Mann* v. *Tacoma Land Co.*, 153 U. S. 273 (1894).[8]

C

Finally, we observe that not the least of the difficulties with petitioners' position is their concession that the States own the tidelands bordering the oceans, bays, and estuaries—even where these areas by no means could be considered navigable, as is always the case near the shore. Tr. of Oral Arg. 6. It is obvious that these waters are part of the sea, and the lands beneath them are state property; ultimately, though, the only proof of this fact can be that the waters are influenced by the ebb and flow of the tide. This is undoubtedly why the ebb-and-flow test has been the measure of public ownership of tidelands for so long.

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[8] *Mann* appears to be the only previous case from this Court concerning lands beneath nonnavigable, tidal waters. In *Mann*, the lands at issue were "tide-flats" or "mud flats" located about one mile from the shore of Commencement Bay "covered to a uniform depth of from two to four feet (according to the run of the tides) at high water, and . . . entirely bare at low water." See Appellant's Motion to Advance in *Mann* v. *Tacoma Land Co.*, O. T. 1893, No. 375, pp. 1–2.

Appellant contended in *Mann*, much as petitioners argue here, that while the ebb-and-flow test may have been the measure of sovereign ownership at English common law, "the [American] courts have, by the adoption of the rule of 'navigability in fact' as the test of 'navigability in law,' discarded the common law . . . [and held that w]here there is no navigation in fact, there is no State ownership by virtue of sovereignty." Supplementary Brief for Appellant 41. See also *Mann*, 153 U. S., at 277–279. Appellee, like respondents here, argued that cases such as *Barney* v. *Keokuk* extended the public trust doctrine to cover navigable-in-fact freshwaters, without reducing the scope of the public trust in tidelands. Brief for Appellee 2–4.

The Court, without commenting on the fact that the lands in question were beneath nonnavigable tidal waters, held the lands to be within the public trust, and within the scope of its earlier decision in *Shively*. *Mann*, *supra*, at 283. Thus, the Court implicitly rejected the argument being advanced by petitioners here: that navigability in fact determined the scope of public trust tidelands.

Admittedly, there is a difference in degree between the waters in this case, and nonnavigable waters on the seashore that are affected by the tide. But there is no difference in kind. For in the end, all tidewaters are connected to the sea: the waters in this case, for example, by a navigable, tidal river. Perhaps the lands at issue here differ in some ways from tidelands directly adjacent to the sea; nonetheless, they still share those "geographical, chemical and environmental" qualities that make lands beneath tidal waters unique. Cf. *Kaiser Aetna* v. *United States*, 444 U. S. 164, 183 (1979) (BLACKMUN, J., dissenting).

Indeed, we find the various alternatives for delineating the boundaries of public trust tidelands offered by petitioners and their supporting *amici* to be unpersuasive and unsatisfactory.[9] As the State suggested at argument, see Tr. of Oral Arg. 22–23, and as recognized on several previous occasions, the ebb-and-flow rule has the benefit of "uniformity and certainty, and . . . eas[e] of application." See, *e. g.*, *Cobb* v. *Davenport*, 32 N. J. L. 369, 379 (1867). We are unwilling, after its lengthy history at common law, in this Court, and in many state courts, to abandon the ebb-and-flow rule now, and seek to fashion a new test to govern the limits of public trust tidelands. Consequently, we hold that the lands at issue in this case were within those given to Mississippi when the State was admitted to the Union.

IV

Petitioners in passing, and *amici* in somewhat greater detail, complain that the Mississippi Supreme Court's decision is "inequitable" and would upset "various . . . kinds of property expectations and interests [which] have matured since Mississippi joined the Union in 1817."[10] They claim

[9] See, *e. g.*, Tr. of Oral Arg. 6–7; Brief for American Land Title Association as *Amicus Curiae* 6–7, and n. 4.

[10] Brief for Petitioners 37. See also Tr. of Oral Arg. 31–32; Brief for City of Elizabeth, New Jersey, et al. as *Amici Curiae* 17–20; Brief for American Land Title Association as *Amicus Curiae* 1–3.

that they have developed reasonable expectations based on their record title for these lands, and that they (and their predecessors-in-interest) have paid taxes on these lands for more than a century.

We have recognized the importance of honoring reasonable expectations in property interests. Cf. *Kaiser Aetna* v. *United States*, *supra*, at 175. But such expectations can only be of consequence where they are "reasonable" ones. Here, Mississippi law appears to have consistently held that the public trust in lands under water includes "title to all the land under tidewater." *Rouse* v. *Saucier's Heirs*, 166 Miss. 704, 713, 146 So. 291, 291–292 (1933).[11] Although the Mississippi Supreme Court acknowledged that this case may be the first where it faced the question of the public trust interest in nonnavigable tidelands, 491 So. 2d, at 516, the clear and unequivocal statements in its earlier opinions should have been ample indication of the State's claim to tidelands. Moreover, cases which have discussed the State's public trust interest in these lands have described uses of them not related to navigability, such as bathing, swimming, recreation, fishing, and mineral development. See, *e. g.*, *Treuting* v. *Bridge and Park Comm'n of City of Biloxi*, 199 So. 2d 627, 632–633 (Miss. 1967). These statements, too, should have made clear that the State's claims were not limited to lands under navigable waterways. Any contrary expectations cannot be considered reasonable.

We are skeptical of the suggestions by the dissent, *post*, at 485, 493, that a decision affirming the judgment below will have sweeping implications, either within Mississippi or outside that State. The State points out that only one other case is pending in its courts which raises this same issue. Tr. of Oral Arg. 19. And as for the effect of our decision today in other States, we are doubtful that this ruling will do

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[11] See also *State ex rel. Rice* v. *Stewart*, 184 Miss. 202, 230, 184 So. 44, 49 (1938); *Martin* v. *O'Brien*, 34 Miss. 21, 36 (1857).

more than confirm the prevailing understanding—which in some States is the same as Mississippi's, and in others, is quite different. As this Court wrote in *Shively* v. *Bowlby*, 152 U. S., at 26, "there is no universal and uniform law upon the subject; but . . . each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy."

Consequently, our ruling today will not upset titles in all coastal States, as petitioners intimated at argument. Tr. of Oral Arg. 32. As we have discussed *supra*, at 475, many coastal States, as a matter of state law, granted all or a portion of their tidelands to adjacent upland property owners long ago.[12] Our decision today does nothing to change ownership rights in States which previously relinquished a public trust claim to tidelands such as those at issue here.

Indeed, we believe that it would be far more upsetting to settled expectations to reverse the Mississippi Supreme Court decision. As *amici* note, see, *e. g.*, Brief for State of California et al. as *Amici Curiae* 19, many land titles have been adjudicated based on the ebb-and-flow rule for tidelands—we cannot know how many titles would have to be adjusted if the scope of the public trust was now found to be limited to lands beneath navigable tidal waters only. If States do not own lands under nonnavigable tidal waters, many state land grants based on our earlier decisions might now be invalid. Cf. *Hardin* v. *Jordan*, 140 U. S., at 381–382. Finally, even where States have given dominion over

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[12] See, *e. g.*, *Bradford* v. *The Nature Conservancy*, 224 Va. 181, 195–198 (1982); *Tinicum Fishing Co.* v. *Carter*, 61 Pa. 21, 30–31 (1869); *Bickel* v. *Polk*, 5 Del. 325, 326 (1851); *Storer* v. *Freeman*, 6 Mass., at 437–439.

It is worth noting, however, that even in some of these States—*i. e.*, even where tidelands are privately held—public rights to use the tidelands for the purposes of fishing, hunting, bathing, etc., have long been recognized. See, *e. g.*, *Bradford*, *supra*, at 191, 197; *Bickel*, *supra*, at 326. Limiting the public trust doctrine to only tidelands under navigable waters might well result in a loss to the public of some of these traditional privileges.

tidelands to private property owners, some States have retained for the general public the right to fish, hunt, or bathe on these lands. See n. 12, *supra*. These long-established rights may be lost with respect to nonnavigable tidal waters if we adopt the rule urged by petitioners.

The fact that petitioners have long been the record title holders, or long paid taxes on these lands does not change the outcome here. How such facts would transfer ownership of these lands from the State to petitioners is a question of state law. Here, the Mississippi Supreme Court held that under Mississippi law, the State's ownership of these lands could not be lost via adverse possession, laches, or any other equitable doctrine. 491 So. 2d, at 521. See Miss. Const., Art. 4, § 104; *Gibson* v. *State Land Comm'r*, 374 So. 2d 212, 216–217 (1979); *City of Bay St. Louis* v. *Board of Supervisors of Hancock County*, 80 Miss. 364, 371–372, 32 So. 54 (1902). We see no reason to disturb the "general proposition [that] the law of real property is, under our Constitution, left to the individual States to develop and administer." *Hughes* v. *Washington*, 389 U. S. 290, 295 (1967) (Stewart, J., concurring). See *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144, 155 (1944); *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U. S. 10, 22 (1935). Consequently, we do not believe that the equitable considerations petitioners advance divest the State of its ownership in the disputed tidelands.

V

Because we believe that our cases firmly establish that the States, upon entering the Union, were given ownership over all lands beneath waters subject to the tide's influence, we affirm the Mississippi Supreme Court's determination that the lands at issue here became property of the State upon its admission to the Union in 1817. Furthermore, because we find no reason to set aside that court's state-law determination that subsequent developments did not divest the

State of its ownership of these public trust lands, the judgment below is

Affirmed.

JUSTICE KENNEDY took no part in the consideration or decision of this case.

JUSTICE O'CONNOR, with whom JUSTICE STEVENS and JUSTICE SCALIA join, dissenting.

Breaking a chain of title that reaches back more than 150 years, the Court today announces a rule that will disrupt the settled expectations of landowners not only in Mississippi but in every coastal State. Neither our precedents nor equitable principles require this result, and I respectfully dissent from this undoing of settled history.

I

As the Court acknowledges, *ante*, at 478, this case presents an issue that we never have decided: whether a State holds in public trust all land underlying tidally influenced waters that are neither navigable themselves nor part of any navigable body of water. In holding that it does, the majority relies on general language in opinions that recognized state claims to land underlying tidewaters. But those cases concerned land lying beneath waters that were in fact navigable, *e. g.*, *Shively* v. *Bowlby*, 152 U. S. 1 (1894) (Columbia River in Oregon), or beneath waters that were part of or immediately bordering a navigable body of water, *e. g.*, *Mann* v. *Tacoma Land Co.*, 153 U. S. 273 (1894) (shallow tidelands in Commencement Bay in Washington). Until today, none of our decisions recognized a State's public trust title to land underlying a discrete and wholly nonnavigable body of water that is properly viewed as separate from any navigable body of water.

In my view, the public trust properly extends only to land underlying navigable bodies of water and their borders, bays, and inlets. This Court has defined the public trust repeat-

edly in terms of navigability. *E. g., Utah Div. of State Lands* v. *United States*, 482 U. S. 193 (1987); *Montana* v. *United States*, 450 U. S. 544, 551 (1981); *Utah* v. *United States*, 403 U. S. 9, 10 (1971); *United States* v. *Oregon*, 295 U. S. 1, 14 (1935); *United States* v. *Utah*, 283 U. S. 64, 75 (1931); *United States* v. *Holt State Bank*, 270 U. S. 49, 54–55 (1926); *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U. S. 77, 84–85 (1922); *Oklahoma* v. *Texas*, 258 U. S. 574, 583 (1922); *Pollard's Lessee* v. *Hagan*, 3 How. 212, 230 (1845). It is true that these cases did not involve waters subject to the ebb and flow of the tide. But there is no reason to think that different tests of the scope of the public trust apply to saltwater and to freshwater. Navigability, not tidal influence, ought to be acknowledged as the universal hallmark of the public trust.

The public trust doctrine has its roots in English common law. Traditionally, all navigable waterways in England were by law common highways for the public. M. Hale, De Jure Maris et Brachiorum ejusdem, cap. iii (1667), reprinted in R. Hall, Essay on the Rights of the Crown and the Privileges of the Subject in the Sea Shores of the Realm, App. v (2d ed. 1875). Furthermore, the King held title to the soil beneath the sea and the arms of the sea, "where the sea flows and reflows." Hale, cap. iv, reprinted in Hall, *supra*, at App. vii, ix. When the first American States became sovereign after our Revolution, their governments succeeded to the King's rights with respect to waters within their borders. *Martin* v. *Waddell*, 16 Pet. 367, 410 (1842). New States like Mississippi, upon entering the Union, acquired equivalent rights under the equal-footing doctrine. *Pollard's Lessee* v. *Hagan*, *supra*, at 228–229. Hence both petitioners and respondents have made an effort to ascertain the extent of the King's rights under English common law.

Unfortunately, English cases of the late 18th and early 19th centuries did not directly address whether the King held title to lands underlying tidally influenced, nonnavigable waters. Certainly the public's right of navigation was limited

to waterways that were navigable in fact, and did not extend to every waterway subject to the ebb and flow of the tide. As Lord Mansfield explained:

> "How does it appear that this is a navigable river? The flowing and reflowing of the tide does not make it so, for there are many places into which the tide flows that are not navigable rivers; and the place in question may be a creek in their own private estate." *Mayor of Lynn* v. *Turner*, 1 Cowp. 86, 98 Eng. Rep. 980, 981 (K. B. 1774).

This principle of British law has proved enduring. See *Rex* v. *Montague*, 4 B. & C. 598, 602, 107 Eng. Rep. 1183, 1184 (K. B. 1825); S. Hobday, Coulson & Forbes on the Law of Waters 100–101 (6th ed. 1952). It appears, however, that the King's title to submerged land was not coextensive with the public's right of navigation. Thus in *Murphy* v. *Ryan*, 2 Ir. R.-C. L. 143, 152 (1868), the court explained that the King did not hold title to the land underlying navigable waters, unless they were influenced by the tide. Accord, *Earl of Ilchester* v. *Raishleigh*, 61 L. T. R. (n. s.) 477, 479 (Ch. 1889); Hobday, *supra*, at 102. It may be that the King also did not hold title to land underlying tidally influenced waters, unless they were navigable. Certainly there are cases that describe the King's proprietary rights as pertaining to land underneath navigable water. *Rex* v. *Smith*, 2 Dougl. 441, 446, 99 Eng. Rep. 283, 285 (K. B. 1780); *Lord Advocate for Scotland* v. *Hamilton*, 1 Macq. 46, 49 (H. L. 1852); *Le Roy* v. *Trinity House*, 1 Sid. 86, 82 Eng. Rep. 986 (K. B. 1662). This strongly suggests that English common law did not authorize the claims that Mississippi makes in this case.

American cases have developed the public trust doctrine in a way that is consistent with its common-law heritage. Our precedents explain that the public trust extends to navigable waterways because its fundamental purpose is to preserve them for common use for transportation.

> "It is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon [navigable waterways], and consequently to the exclusion of private ownership, either of the waters or the soils under them." *Packer* v. *Bird*, 137 U. S. 661, 667 (1891).

Similarly, the Court has emphasized that the public trust doctrine "is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment." *Illinois Central R. Co.* v. *Illinois*, 146 U. S. 387, 436 (1892).

Although the States may commit public trust waterways to uses other than transportation, such as fishing or land reclamation, this exercise of sovereign discretion does not enlarge the scope of the public trust. Even the majority does not claim that the public trust extends to every waterway that can be used for fishing or for land reclamation. Nor does the majority explain why its tidal test is superior to a navigability test for the purpose of identifying waterways that are suited to these other uses.

Because the fundamental purpose of the public trust is to protect commerce, the scope of the public trust should parallel the scope of federal admiralty jurisdiction. This Court long ago abandoned the tidal test in favor of the navigability test for defining federal admiralty jurisdiction, describing the ebb and flow test as "purely artificial and arbitrary as well as unjust." *The Propeller Genesee Chief* v. *Fitzhugh*, 12 How. 443, 457 (1852). The Court recognized that whether waters are influenced by the tide is irrelevant to the purposes of admiralty jurisdiction, which are to facilitate commerce in times of peace and to administer the special rules of war. *Id.*, at 454. Subsequent admiralty cases confirm that "the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters." *The Daniel Ball*, 10 Wall. 557, 563 (1871).

Having defined admiralty jurisdiction in terms of navigability, the Court applied the same reasoning to the problem of defining the public trust. The Court explained that "the public authorities ought to have entire control of the great passageways of commerce and navigation, to be exercised for the public advantage and convenience." *Barney* v. *Keokuk*, 94 U. S. 324, 338 (1877). And it sweepingly concluded that the tidal test "had no place in American jurisprudence since the decision in the case of *The Propeller Genesee Chief* v. *Fitzhugh*, 12 How. 443." *McGilvra* v. *Ross*, 215 U. S. 70, 78 (1909). These cases defined the public trust in the context of inland waterways. But the same reasoning applies to waterways influenced by the tide. Navigability, not tidal influence, characterizes the waterways that are suited to the purposes of the public trust.

Congress also has evidenced its belief that the States' public trusts are limited to lands underlying navigable waters. In 1953, Congress passed the Submerged Lands Act, 43 U. S. C. §§ 1301–1315. Congress intended to confirm the States' existing rights to lands beneath navigable waters. S. Rep. No. 133, 83d Cong., 1st Sess., pt. 1, p. 8 (1953); H. R. Rep. No. 1778, 80th Cong., 2d Sess., p. 3 (1948); *Bonelli Cattle Co.* v. *Arizona*, 414 U. S. 313, 324 (1973). The Act defines "lands beneath navigable waters" as including lands "covered by tidal waters." 43 U. S. C. § 1301(a)(2). If tidal waters included discrete bodies of *non-navigable* water, this definition would be self-contradictory. Thus it appears that Congress understood "tidal waters" as referring to the boundaries of the navigable ocean. As Senator Cordon explained, "lands beneath navigable waters" identifies lands "as being under nontidal waters in the upper areas or being in tidal waters and—and I want this emphasized—outside inland waters." 99 Cong. Rec. 2632 (1953). Although the Submerged Lands Act is not at issue in this case, it is evidence of Congress' interpretation of the public

trust doctrine, and that interpretation is entitled to consideration.

In sum, the purpose of the public trust, the analogy to federal admiralty jurisdiction, and the legislative history of the Submerged Lands Act all indicate that the States hold title only to lands underlying navigable waters. The term "navigable waters" is not self-defining, however. It must be construed with reference to cases in which this Court has described the boundaries of the public trust.

For public trust purposes, navigable bodies of water include the nonnavigable areas at their boundaries. The question whether a body of water is navigable is answered waterway by waterway, not inch by inch. The borders of the ocean, which certainly is navigable, extend to the mean high tide line as a matter of federal common law. *United States* v. *Pacheco*, 2 Wall. 587, 590 (1865); see *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U. S. 363, 376 (1977). Hence the States' public trusts include the ocean shore over which the tide ebbs and flows. This explains why there is language in our cases describing the public trust in terms of tidewaters: each of those cases concerned the shores of a navigable body of water. See, *e. g.*, *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U. S. 10, 16 (1935); *United States* v. *Mission Rock Co.*, 189 U. S. 391, 404–405 (1903); *Knight* v. *United States Land Assn.*, 142 U. S. 161, 183 (1891). This does not imply, however, that all tidally influenced waters are part of the sea any more than it implies that the Missouri River is part of the Gulf of Mexico.

The Court holds today that the public trust includes not only tidewaters along the ocean shore, but also discrete bodies of water that are influenced by the tide but far removed from the ocean or any navigable tidal water, such as the separate little streams and bayous at issue here. The majority doubts whether a satisfactory test could be devised for distinguishing between the two types of tidally influenced waters. *Ante*, at 481. It therefore adopts a test that will include in

the public trust every body of water that is interconnected to the ocean, even indirectly, no matter how remote it is from navigable water. This is wholly inconsistent with the federal law that identifies what inland freshwaters belong to the public trust. For example, if part of a freshwater river is navigable in fact, it does not follow that all contiguous parts of the river belong to the public trust, no matter how distant they are from the navigable part. Conversely, federal law does not exclude from the public trust all nonnavigable portions of a navigable river, such as shallow areas near the banks.

> "The question here is not with respect to a short interruption of navigability in a stream otherwise navigable, or of a negligible part, which boats may use, of a stream otherwise non-navigable. We are concerned with long reaches with particular characteristics of navigability or non-navigability . . . ." *United States* v. *Utah*, 283 U. S., at 77 (footnote omitted).

See *Oklahoma* v. *Texas*, 258 U. S. 574 (1922) (applying the navigability test to identify what parts of the Red and Arkansas Rivers belong to the public trust). To decide whether the tidewaters at issue in this case belong to the public trust, the Court should apply the same fact-specific navigability test that it applies to inland waters. It should distinguish between navigable bodies of water and connected, but discrete, bodies of tidally influenced water. To this end, Justice Field once applied the headland to headland test, a "universal rule governing the measurement of waters," and drew a boundary dividing the navigable waters of San Francisco Bay from the tidally influenced waters of Mission Creek. *Knight* v. *United States Land Assn.*, *supra*, at 207 (concurring opinion). Only waterways that are part of a navigable body of water belong to the public trust.

II

The controversy in this case concerns more than cold legal doctrine. The particular facts of this case, to which the Court's opinion gives short shrift, illustrate how unfortunate it is for the Court to recognize a claim that appears belated and opportunistic.

Mississippi showed no interest in the disputed land from the time it became a State until the 1970's. Petitioners, or prior titleholders, recorded deeds on the land and paid property taxes throughout this period. App. to Pet. for Cert. 41a. In 1973, Mississippi passed the Coastal Wetlands Protection Law. Miss. Code Ann. §§ 49–27–1 to 49–27–69 (Supp. 1987). This statute directed the Mississippi Marine Resources Council to prepare maps identifying state-owned wetlands. The maps, drawn from aerial photographs, were intended to show the probable scope of state-owned wetlands in order to aid state agencies in planning to protect them. § 49–27–65. But the Mineral Lease Commission decided to use the maps as a basis for issuing oil and gas leases on what appeared to be state-owned lands. The Commission leased 600 acres to respondent Saga Petroleum U. S., Inc.

Petitioners, holders of record title, filed a complaint in Chancery Court to quiet title to the 600 contested acres and an additional 1,800 acres in the area. The Chancery Court decided that the public trust included lands underlying all tidally influenced waters. Even under this test, only 140.863 acres of the land belonged to the State of Mississippi. On appeal, the Supreme Court of Mississippi reduced Mississippi's claim by another 98 acres to account for land underlying two artificial lakes. The land now claimed by Mississippi consists of slightly more than 42 acres underlying the north branch of Bayou LaCroix and 11 small drainage streams.

These waterways are not used for commercial navigation. None of the drainage streams is more than a mile long; all are nameless. Mississippi is not pressing its claim for the sake of facilitating commerce, or even to protect the public's inter-

est in fishing or other traditional uses of the public trust. Instead, it is leasing the land to a private party for exploitation of underlying minerals. Mississippi's novel undertaking has caused it to press for a radical expansion of the historical limits of the public trust.

The Court's decision today could dispossess thousands of blameless record owners and leaseholders of land that they and their predecessors in interest reasonably believed was lawfully theirs. The Court concludes that a decision favoring petitioners would be even more disruptive, because titles may have been adjudicated on the assumption that a tidal test defines the public trust. *Ante*, at 483. There is no way to ascertain, as a general matter, what assumptions about the public trust underlie existing property titles. What evidence there is suggests that the majority's rule is the one that will upset settled expectations. For example, the State of New Jersey has decided to apply the Court's test. It now claims for its public trust all land underlying nonnavigable tidal waters, and all land that has been under tidal waters at any time since the American Revolution.

> "Due to this attempted expansion of the [public trust] doctrine, hundreds of properties in New Jersey have been taken and used for state purposes without compensating the record owners or lien holders; prior homeowners of many years are being threatened with loss of title; prior grants and state deeds are being ignored; properties are being arbitrarily claimed and conveyed by the State to persons other than the record owners; and hundreds of cases remain pending and untried before the state courts awaiting processing with the National Resource Council." Porro & Teleky, Marshland Title Dilemma: A Tidal Phenomenon, 3 Seton Hall L. Rev. 323, 325–326 (1972) (footnotes omitted).

See also Brief for the City of Elizabeth, New Jersey, et al. as *Amici Curiae* 17–20 (confirming that these problems have

not abated). The Court's decision today endorses and encourages such action in other States.

Although there is no way to predict exactly how much land will be affected by the Court's decision, the magnitude of the problem is suggested by the fact that more than 9 million acres have been classified as fresh or saline coastal wetlands. S. Shaw & C. Fredine, Wetlands of the United States, United States Department of the Interior, Fish & Wildlife Service, Circular 39, p. 15 (1956). The Federal Government conveyed these lands to the States, which have conveyed many of them to individuals. To the extent that the conveyances to private parties purported to include public trust lands, the States may strike them down, if state law permits. *Illinois Central R. Co.* v. *Illinois*, 146 U. S., at 452–454; see *Coastal Petroleum Co.* v. *American Cyanamid Co.*, 492 So. 2d 339, 342–343 (Fla. 1986), cert. denied *sub nom. Mobil Oil Corp.* v. *Board of Trustees of Internal Improvement Trust Fund of Fla.*, 479 U. S. 1065 (1987); Brief for American Land Title Association as *Amicus Curiae* 2–3. The Court's broad definition of public trust lands will increase the amount of land that is vulnerable to such challenges.

The Court's suggestion, *ante*, at 484, that state law might honor the equitable considerations that support individual claims to public trust lands, is not persuasive. Certainly the Mississippi Supreme Court's decision in this case attached little weight to petitioners' equitable claims. Although Mississippi collected taxes on the land and made no mention of its claim for over 150 years, the Mississippi Supreme Court held that Mississippi was not estopped from dispossessing petitioners. *Cinque Bambini Partnership* v. *State*, 491 So. 2d 508, 521 (1986). The stakes are high when the land lies over valuable oil, gas, or mineral deposits.

The Court's decision departs from our precedents, and I fear that it may permit grave injustice to be done to innocent property holders in coastal States. I dissent.

ETSI PIPELINE PROJECT *v.* MISSOURI ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 86–939. Argued November 3, 1987—Decided February 23, 1988*

In 1982, petitioner ETSI Pipeline Project entered into a 40-year contract with petitioner Secretary of the Interior to withdraw up to a certain amount of water per year from Lake Oahe, a reservoir located on the Missouri River in South Dakota, for use in an interstate coal slurry pipeline. Respondents Missouri, Iowa, and Nebraska filed suit in Federal District Court to enjoin performance of the contract, alleging that, under the Flood Control Act of 1944 (Act), the Interior Secretary lacked authority to execute a contract to provide water from the reservoir for industrial uses without obtaining the approval of the Secretary of the Army. Pursuant to the Act, the Oahe Reservoir was built by the Corps of Engineers, now part of the Department of the Army (successor of the Department of War), which has always maintained and operated the reservoir. The Act was directed to both flood control and navigation matters that concerned the War Department, and reclamation and irrigation problems that concerned the Interior Department, thus also implicating the tensions between the Upper Missouri River Basin States' interests in irrigation and reclamation and the interests of the Lower Basin States (including respondents) in flood control. The District Court ruled for respondents, and the Court of Appeals affirmed.

Held: The Secretary of the Interior exceeded the authority Congress delegated to him by the Act. Pp. 505–517.

(a) In light of the Act's provisions specifying the powers of the Secretary of the Army and the Secretary of the Interior—particularly the former's authority as to the use and disposal of water at any reservoir under the Army Department's control—as well as the Act's general background, the Interior Secretary does not possess the authority to execute a contract to provide water from an Army reservoir for industrial use without obtaining the Army Secretary's approval. Under the Act's language, if the Interior Secretary wishes to remove water from an Army reservoir for *any* purpose, the approval of the Army Secretary must be secured. As long as ample water remains in the Oahe Reservoir for the purposes embodied in the Act, and absent any allocation for

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*Together with No. 86–941, *Hodel, Secretary of the Interior, et al.* v. *Missouri et al.*, also on certiorari to the same court.

irrigation pursuant to the Act's terms—the record supporting the District Court's findings that there was no such allocation or use of the reservoir's water for irrigation—the Army Secretary has exclusive authority to contract to remove water for industrial use. Pp. 505–509.

(b) There is no merit to petitioners' contention that the Act's provisions approving general comprehensive plans for projects to be operated by both the Interior and Army Departments represent congressional approval of any functional division of authority between those Departments and allows the Interior Secretary unilaterally to remove water from Army reservoirs for irrigation purposes and for other related uses. Such contention is wide of the mark in view of the Act's specific jurisdictional provisions discussed above as to the use of Army reservoirs, and is grounded on a misuse of the legislative history. There is no indication that control over individual reservoirs was to be divided among various Departments of the Federal Government. Nor is petitioners' argument supported by a provision of the Act stating that reclamation and power developments to be undertaken by the Interior Secretary shall be governed by federal reclamation laws, which authorize him to reallocate water under his control for industrial use. Such provision of the Act applies only to projects that the Interior Department itself may undertake under the Act. But as the District Court found, the reservoir project engineered by the Army at Oahe is neither a power development nor a reclamation development undertaken by the Interior Secretary. Moreover, there is no merit to petitioners' contention that, although the Interior Department must consult with the Army Department before withdrawing water for industrial use from the Oahe Reservoir, the Interior Department can proceed without the Army Department's approval as long as the latter does not object. Pp. 509–515.

(c) It is unnecessary to consider petitioners' contention that deference to the Interior Secretary's interpretation of the Act is appropriate here, and their related arguments about the history of relations between the Army and Interior Departments under the Act, for even if the Interior Department's interpretation would be entitled to any deference in these circumstances, the Executive Branch is not permitted to administer the Act in a manner that is inconsistent with the administrative structure that Congress enacted into law. The Act speaks directly to the dispute, and congressional intent as expressed in the Act indicates clearly that the Interior Secretary may not enter into a contract to withdraw water from an Army reservoir for industrial use without the approval of the Army Department. Pp. 515–517.

787 F. 2d 270, affirmed.

WHITE, J., delivered the opinion of the Court, in which all other Members joined, except KENNEDY, J., who took no part in the consideration or decision of the case.

Jeffrey P. Minear argued the cause for petitioners in both cases. With him on the brief for petitioners in No. 86–941 were *Solicitor General Fried, Acting Assistant Attorney General Flint, Deputy Solicitor General Wallace, Fred R. Disheroon,* and *Ralph W. Tarr. James A. Hourihan, Walter A. Smith, Jr.,* and *Mary Anne Sullivan* filed briefs for petitioner in No. 86–939.

Elizabeth M. Osenbaugh, Deputy Attorney General of Iowa, argued the cause for respondents in both cases. With her on the brief for respondents State of Missouri et al. were *Thomas J. Miller,* Attorney General of Iowa, *Eliza Ovrom,* Assistant Attorney General, *William L. Webster,* Attorney General of Missouri, *Curtis F. Thompson,* Assistant Attorney General, *Robert M. Spire,* Attorney General of Nebraska, and *Le Roy W. Sievers,* Assistant Attorney General. *Stephen E. Roady, Ronald J. Wilson,* and *William E. Walters III* filed a brief for respondents Kansas City Southern Railway Co. et al.†

JUSTICE WHITE delivered the opinion of the Court.

We must decide whether in the circumstances of this case the Secretary of the Interior has exceeded the authority Congress delegated to him by the Flood Control Act of 1944.

I

The dispute centers on Lake Oahe, an enormous reservoir located on the Missouri River in South Dakota, with a capacity of more than 23 million acre-feet of water. In 1982, ETSI

†*Roger A. Tellinghuisen,* Attorney General of South Dakota, *Charles J. Meyers, Joseph B. Meyer,* Attorney General of Wyoming, *Michael T. Greely,* Attorney General of Montana, and *Nicholas J. Spaeth,* Attorney General of North Dakota, filed a brief for the State of Montana et al. as *amici curiae* urging reversal.

Pipeline Project entered into a contract with the Secretary of the Interior to withdraw up to 20,000 acre-feet of water from Lake Oahe per year for 40 years.[1] South Dakota already had granted ETSI a state permit to use this water in a coal slurry pipeline that would transport coal from Wyoming to the southeastern United States. Soon after the contract was signed, the States of Missouri, Iowa, and Nebraska brought suit in District Court to enjoin performance of the contract, alleging that the manner in which the contract was approved violated several federal statutes. In particular, the plaintiffs contended that the Interior Secretary lacks statutory authority under the Flood Control Act of 1944 (Act), 58 Stat. 887, to execute a contract to provide water from Lake Oahe for industrial uses without obtaining the approval of the Secretary of the Army.[2]

The District Court ruled for the plaintiffs. *Missouri* v. *Andrews*, 586 F. Supp. 1268 (Neb. 1984). It concluded that the Oahe Dam was not a reclamation or power development that was undertaken by the Interior Secretary, pursuant to clear statutory authority. Instead, the dam was built by the Corps of Engineers, now part of the Department of the Army (formerly the Department of War, but renamed by Act of July 26, 1947, 61 Stat. 495), which has always maintained and operated the reservoir. No block of water in Lake Oahe has been specifically set aside for use by the Interior Department, and the Interior Secretary has not constructed any works at Lake Oahe. On these facts, the District Court held

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[1] Although the contract states that the Interior Secretary entered into it "after consultation with the Secretary of the Army," App. 226, no party has disputed the fact that the Secretary of the Army did not expressly approve or sign the contract, which was signed on behalf of the United States by a regional director for the Interior Department's Bureau of Reclamation. *Id.*, at 234.

[2] This case also has involved several procedural issues, as well as ancillary issues about the validity of the contract. Those other issues are not before this Court. Neither is there any issue presented here as to the relative interests of the United States and South Dakota in Lake Oahe water.

that the Act does not empower the Interior Secretary to furnish water from Lake Oahe for industrial use.

The Court of Appeals affirmed, with one judge dissenting. *Missouri* v. *Andrews*, 787 F. 2d 270 (CA8 1986). It upheld the District Court's conclusion that Lake Oahe is not a reclamation development undertaken by the Interior Secretary, primarily because the Army built the reservoir and controls its operation. Accordingly, the Interior Secretary cannot contract on his own to withdraw water from the reservoir for industrial use. Neither the language nor the legislative history of the Act was thought to support the claim that the Interior Secretary was ceded broad authority over water in this reservoir, even water that it claims has been designated as available for future irrigation purposes. Indeed, the language of the Act and its legislative history were found to be convincing enough on this point that the Court of Appeals refused to defer to the Interior Secretary's contrary interpretation.

The Court of Appeals denied a petition for rehearing en banc by an equally divided vote of the judges. We granted certiorari, 480 U. S. 905 (1987), and we now affirm.

II

A

The Missouri River Basin is a watershed that covers a vast area in the midwestern United States. The topography of this area, however, reveals two distinct regions that experience very different water problems. The upper part of the Basin, which includes large sections of Montana, Wyoming, North Dakota, and South Dakota, is mostly arid or semiarid; there, the Missouri River and its tributaries are important because they represent a major resource for developing the agricultural and industrial potential of the area. The lower part of the Basin, which includes territory in Nebraska, Kansas, Iowa, and Missouri, is more humid, and there the rivers are used chiefly for navigation, though the critical problem in

this region is to control flooding. See generally M. Ridgeway, The Missouri Basin's Pick-Sloan Plan 47–55 (1955). In the early 1940's, Congress focused its attention on the water problems of the Missouri River Basin, prompted especially by severe floods that had devastated the lower Basin in 1943 and 1944.

At the behest of Congress, the Army Corps of Engineers prepared a report that described a comprehensive plan to develop the entire Basin, known as the Pick Plan for its author, a colonel in the Corps. The Pick Plan proposed the construction of 12 multiple-purpose reservoirs and related works, including 5 reservoirs on the main stem of the Missouri River, at an approximate initial cost of $480 million, though it was estimated that to carry out the entire proposal might cost close to $1 billion. The Pick Plan stressed flood control as its primary objective, but noted that its comprehensive list of projects "would also provide for the most efficient utilization of the waters of the Missouri River Basin for all purposes, including irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation," as well as other intangible benefits. H. R. Doc. No. 475, 78th Cong., 2d Sess., 29 (1944) (H. R. Doc.). The report estimated the gross storage capacity of the Oahe Reservoir at about 6 million acre-feet of water.

At almost the same time, the Interior Department's Bureau of Reclamation independently completed its own plan to develop the Basin, which it had begun earlier, known as the Sloan Plan after the Montana engineer who prepared much of its analysis. The Sloan Plan proposed a total of 90 reservoirs, many of them on the smaller tributary streams, and included 3 reservoirs on the main stem of the Missouri River, at a projected cost of $1.2 billion, with much of that figure to be repayable. The Sloan Plan was also a comprehensive proposal, though it emphasized use of the water for irrigating land, especially in the upper part of the Basin. It estimated that the Oahe Reservoir would hold 19,600,000 acre-feet of

water. The Sloan Plan also contained a section comparing its provisions to those in the Pick Plan and suggesting modifications to the Pick Plan "which appear necessary to satisfy water-use requirements throughout the Missouri River Basin." S. Doc. No. 191, 78th Cong., 2d Sess., 120 (1944) (S. Doc.). This section concluded that though "the capacity of individual reservoirs, as well as aggregate capacities, remain to be determined in greater detail," the "Army and Reclamation plans on storage needs for all purposes can be composed." *Id.*, at 122–123.

The Pick and Sloan Plans differed with one another not only in their primary objectives, but also in several other important respects, such as the amount of expenditures and the number of projects. The engineering features of the two plans also were dissimilar. On the main stem of the Missouri River, the two plans called for different numbers of reservoirs of divergent sizes, and thus for inconsistent amounts of total water storage. Even where the two plans agreed on the need for a particular reservoir at a particular location, which they did at Oahe and at Fort Randall, they envisioned those projects very differently; as noted above, for example, the Sloan Plan proposed that Lake Oahe would hold more than three times as much water as called for in the Pick Plan, at an additional cost of more than $20 million.

Obviously Congress could not proceed with both plans at once. In order to arrive at a single set of projects for development of the Basin, a Committee composed of two representatives each from the Corps of Engineers and the Bureau of Reclamation was appointed to review the engineering features of the two plans. This Committee essentially combined the determinations made by the Corps about the projects that would be needed for flood control and navigation and the determinations made by the Bureau about the additional projects that would be needed for irrigation. After meeting for two days, the Committee produced an engineering report that recommended most of the specific

developments that had been set out in the Sloan Plan, but provided for six main-stem reservoirs on the Missouri River. The Oahe Reservoir was to be created by construction of a high dam and to have a gross storage capacity of 19 million acre-feet of water. The stated purposes of Lake Oahe were to allow "the irrigation of 750,000 acres of land in the James River Basin as well as to provide useful storage for flood control, navigation, the development of hydroelectric power, and other purposes." S. Doc. No. 247, 78th Cong., 2d Sess., 3 (1944). As had been proposed in the Sloan Plan, the irrigation of the James River Basin was to be made possible by construction of a system of long canals, including one canal approximately 125 miles long. See S. Doc., at 115–116. With a single set of projects before it at last, Congress enacted the Flood Control Act of 1944 less than two months later.

B

In the Act, Congress accomplished three distinct tasks. First, it authorized certain specific projects to be undertaken by approving the "general comprehensive plans set forth in [the Pick and Sloan Plans] as revised and coordinated by Senate Document 247." § 9(a), 58 Stat. 891. It directed that "the initial stages recommended are hereby authorized and shall be prosecuted by the War Department and the Department of the Interior as speedily as may be consistent with budgetary requirements." *Ibid.* Second, Congress appropriated funds to pay for the initial work done on those projects. Two separate allotments were authorized: $200 million "for the partial accomplishment of the works to be undertaken under said expanded plan by the Corps of Engineers," § 9(d), and another $200 million "for the partial accomplishment of the works to be undertaken under said plans by the Secretary of the Interior." § 9(e).

Third, Congress adopted an administrative framework within which these projects were to go forward. This task involved several areas of potential controversy. The Act

evoked federalism concerns because the States were anxious to keep control over the development of their lands and the use of valuable water resources. In response, Congress declared a policy of "recogniz[ing] the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control." § 1, as set forth in 33 U. S. C. § 701–1 (1952 ed.). The Act also implicated the tensions between the Upper Basin States and the Lower Basin States, whose interests in the use and control of the water were markedly different. Congress addressed this problem by providing that when the Department of War undertook additional works not authorized by the Act it would be required to consult and share information with the affected States and the Secretary of the Interior, depending on whether the works were located west of the 97th and 98th meridians. §§ 1(a) and (b). All projects proposed by the Interior Secretary that would involve construction of "works for irrigation" were made subject to a similar requirement, without regard to geographical location. § 1(c).

Finally, and most directly relevant to this case, the Act required Congress to deal with the administrative jurisdictions of several agencies of the Federal Government. Among the interested agencies were not only the Departments of War and Interior, but also the Department of Agriculture and the Federal Power Commission, both of whom joined the Interior Department in submitting comments on the Pick Plan, and both of whose interests were also touched on by the Act. H. R. Doc., at 1–3, 10–13; Act, §§ 2, 5, 11–15, 58 Stat. 889, 890, 903–907. The crucial provisions here, however, were the sections that set forth the specific authority allotted to War and Interior, the two key Departments affected by the Act. In relevant part, those five central sections of the Act state as follows:

(1) "The Chief of Engineers, under the supervision of the Secretary of War, is authorized to construct, maintain, and

operate public park and recreational facilities in reservoir areas under the control of the War Department, and to permit the construction, maintenance, and operation of such facilities. The Secretary of War is authorized to grant leases of lands, including structure or facilities thereon, in reservoir areas for such periods and upon such terms as he shall deem reasonable." § 4, 16 U. S. C. § 460d (1946 ed.).

(2) "Electric power and energy generated at reservoir projects under the control of the War Department and in the opinion of the Secretary of War not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy." § 5, 16 U. S. C. § 825s (1946 ed.).

(3) "That the Secretary of War is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War Department." § 6, 33 U. S. C. § 708 (1946 ed.).

(4) "Hereafter, it shall be the duty of the Secretary of War to prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs constructed wholly or in part with Federal funds provided on the basis of such purposes, and the operation of any such project shall be in accordance with such regulations." § 7. See 33 U. S. C. § 709 (1946 ed.).

(5) "Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam or reservoir project operated under the direction of the Secretary of War may be utilized for irrigation purposes, the Secretary of the Interior is authorized to construct, operate, and maintain, under the provisions of [the Federal reclamation laws,] . . . such additional works in connection therewith as he may deem necessary for irrigation purposes. . . . Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for

irrigation purposes only in conformity with the provisions of this section." § 8. See 43 U. S. C. § 390 (1946 ed.).

III

A

In light of these specific provisions, as well as the general background to the Act, it is beyond question that the Interior Secretary does not possess the authority that is claimed in this case: to execute a contract to provide water from an Army reservoir for industrial uses without obtaining the approval of the Secretary of the Army. Nobody has disputed that Lake Oahe, one of the six main-stem reservoirs on the Missouri River, was constructed by, and has been operated and maintained by, the Army Secretary, and the District Court found this to be true as a matter of fact. 586 F. Supp., at 1273–1274. The Act says explicitly that such reservoirs are "under the control of" or "under the direction of" the Army Secretary. §§ 4–6, 8. Only two provisions of the Act provide for the Interior Secretary to exercise any authority whatsoever at Army reservoirs, and in both instances the Act clearly states that the Interior Secretary's authority is subordinate to that of the Army Secretary, who does after all "control" those reservoirs. The Interior Secretary is authorized to "transmit and dispose of" electric power and energy generated at Army reservoirs, but only when that energy is "in the opinion of the Secretary of [the Army] not required in the operation of such projects." § 5. The Interior Secretary is also authorized to recommend to the Army Secretary that an Army reservoir "be utilized for irrigation purposes," and to "construct, operate, and maintain . . . such additional works in connection therewith as he may deem necessary for irrigation purposes." § 8. But this authority only comes into play if the Army Secretary "determines" that "any dam or reservoir project operated under [the Secretary's] direction" may be used for such purposes. *Ibid.* The language of the Act is plain in every respect, and the conclu-

sion is unavoidable that if the Interior Secretary wishes to remove water from an Army reservoir for *any* purpose, the approval of the Army Secretary must be secured.

The precise authority claimed by the Interior Secretary in this case is to enter into a contract, without the approval of the Army, to remove from Lake Oahe water that is claimed to be available for irrigation, and to allow that water to be devoted to industrial use. Nowhere does the Act provide any support for this claimed authority, and in fact it is directly inconsistent with §§ 6 and 8 of the Act, which show that only the Army Secretary has that independent authority in this instance. Section 6 gives the Army Secretary the authority "to make contracts with States, municipalities, private concerns, or individuals . . . for domestic and industrial uses for surplus water that may be available at any reservoir" under the Secretary's control, "*Provided*, That no contracts for such water shall adversely affect then existing lawful uses of such water." The language of the Act is plain enough: "surplus water" is all water that can be made available from the reservoir without adversely affecting other lawful uses of the water. As long as ample water remains in Lake Oahe for the purposes embodied in the Act, and absent any allocation for irrigation pursuant to § 8, the Army Secretary has exclusive authority to contract to remove water for industrial uses. In this light, two of the District Court's factual findings take on special significance. First, the District Court found no evidence "which would show that specific storage space in Oahe Reservoir was assigned to irrigation," and "there is no evidence that separate allocations were made at Oahe." 586 F. Supp., at 1277. Second, "there is no evidence that any Oahe water ever has been used for irrigation or will be in the near future." *Id.*, at 1274. In light of these facts, and the plain provisions of § 8, the Interior Secretary had no authority to dispose of Lake Oahe water. The Army Secretary might have but has not done so.[3]

[3] At one time, the Army took the view that the only "surplus water" in the main-stem reservoirs was the water that neither was held in the reser-

Section 8 details the procedures for utilizing water from Lake Oahe for irrigation, and only when these procedures are followed does the Interior Secretary have any authority to deal with Lake Oahe water. The Interior Secretary may recommend to the Army Secretary that an Army reservoir be utilized at least in part for irrigation purposes. If the Army Secretary determines that the reservoir may be used for this purpose, then the Interior Secretary "is authorized to construct, operate, and maintain, under the provisions of [the Federal reclamation laws,] . . . such additional works in connection therewith as he may deem necessary for irrigation purposes." Congress must grant "specific authorization" for the construction of any such additional works. Water from Army reservoirs "may be utilized hereafter for irrigation purposes only in conformity with the provisions of this sec-

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voirs nor was run through the generators to produce hydroelectric power—in other words, that no "surplus water" existed in the reservoirs themselves—apparently because it assumed that all water contained in the reservoirs "is otherwise being used" for specified purposes. Army Memorandum, Marketing of Missouri River Water for Coal Gasification, AR900407 (Dec. 16, 1974), App. 133. More recently, however, the Army has abandoned this assumption and recognized that "this interpretation of what constitutes surplus water is unnecessarily narrow." Memorandum from Susan Crawford, General Counsel of Army, to Assistant Secretary of Army, Proposed Contracts for Municipal and Industrial Water Withdrawals from Main Stem Missouri Reservoirs 2 (March 13, 1986), App. to Brief for Respondent States 14a. Its current position is that § 6 of the Act gives the Army Secretary the same authority over "water he determines is not needed to fulfill a project purpose in Army reservoirs" that the Interior Department possesses over water contained in its own reservoir projects, namely, the authority to withdraw water for industrial use if to do so would not impair the efficiency of the project for its other stated purposes. Memorandum of Crawford 4, App. to Brief for Respondent 16a. See also Army Circular EC 1105–2–181, pp. 3–4 (Oct. 30, 1987). This view is consistent with the language of the Act, for if the term "surplus water" could never include any of the water stored in the reservoirs themselves, then the caveat Congress enacted in § 6—that this grant of authority shall not "adversely affect then existing lawful uses of such water"—would have been irrelevant because this grant of authority could never adversely affect any existing or projected uses of such water.

tion." § 8. It may be recalled at this point that the Sloan Plan, which had envisioned the use of a substantial amount of water from Lake Oahe for irrigation of the James River Basin, was consistent with this approach; the Sloan Plan provided for the construction of massive additional works for irrigation comprising a system of long canals. S. Doc., at 115–116. By this means, Interior would be permitted to withdraw water from Army reservoirs through these additional works for use in irrigation, which would then bring that water under its control, and under the federal reclamation laws the Interior Secretary may reallocate irrigation water from irrigation projects to other purposes when he sees fit, as long as "it will not impair the efficiency of the project for irrigation purposes." 43 U. S. C. § 485h(c) (1946 ed.).[4] In this case, the District Court found that the Interior Department did begin initial construction on irrigation works at Lake Oahe, but Congress later authorized the Department to cancel construction, which it did. 586 F. Supp., at 1274. As already stated, the District Court found that no water from Lake Oahe has ever been used for irrigation, *ibid.*, and we are unaware of any such plans in the near future. Under these circumstances, the Interior Secretary is not "in conformity with the provisions of" § 8, and therefore has no authority under the Act to withdraw water from Lake Oahe, whether for irrigation or otherwise. It is likely that

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[4] See also 43 U. S. C. § 521 (1946 ed.). Under that section the Interior Secretary "in connection with the operations under the reclamation law is hereby authorized to enter into contract to supply water from any project irrigation system for other purposes than irrigation . . . : *Provided* . . . , That no water shall be furnished for the uses aforesaid if the delivery of such water shall be detrimental to the water service for such irrigation project." The Interior Secretary's determination that the sale of water does not impair the irrigation purpose of a project under his control has been accorded broad deference. See, *e. g.*, *Environmental Defense Fund* v. *Morton*, 420 F. Supp. 1037 (Mont. 1976), aff'd in part and rev'd in part, *Environmental Defense Fund* v. *Andrus*, 596 F. 2d 848 (CA9 1979).

Lake Oahe contains surplus water, but that water is subject to disposal by the Army, not by Interior.[5]

B

The petitioners seek to avert this conclusion by pointing to §§ 9(a) and (c) of the Act. Section 9(a) approves the "general comprehensive plans" set out in the Pick Plan and the Sloan Plan, as revised and coordinated by the final Senate Document, and authorizes the initial stages of those projects to be "prosecuted by the War Department and the Department of the Interior as speedily as may be consistent with budgetary requirements." The petitioners contend that this statement represents congressional approval of various aspects of the functional division of authority between the Army and Interior Departments that had been suggested in those plans; in particular, the petitioners suggest that this provision allows the Interior Secretary unilaterally to remove water from Army reservoirs for irrigation purposes and for other related uses.

This contention is both wide of the mark and grounded on a misuse of the legislative history. To begin with, it would be surprising if Congress had followed up the five sections of the Act in which it explicitly established the jurisdiction of Army and Interior over specific uses of Army reservoirs, the last section of which established jurisdiction over the use of those reservoirs for irrigation, with a provision in which it indi-

[5] Nothing in today's decision, it should be emphasized, prevents the water in Lake Oahe from being put to beneficial use for industrial or other purposes. Of the 23 million acre-feet of water stored in this reservoir, by far the most part was projected for potential use in irrigation. As the District Court found, however, none of this water has been allotted for irrigation, no works have been constructed to make use of this water for irrigation, and none of this water has ever been used for irrigation or is likely to be used for that purpose in the foreseeable future. 586 F. Supp., at 1274, 1277. On these facts, there is considerable leeway for the Army Secretary to designate some of this water for industrial use without "adversely affect-[ing]" the "existing lawful uses of such water." Act, § 6. Certainly if the Executive Branch as a whole wishes to put the water in this reservoir to beneficial use, it may do so simply by complying with the terms of the Act.

rectly made further refinements in how water could be used for irrigation, and yet did not offer the slightest indication that it was doing so. In any event, there is no reason to think that § 9(a) incorporates into the Act any additional indications about the proper division of authority between Army and Interior. On the contrary, its location in § 9 of the Act indicates that this provision was not intended as anything more than authorization for the two Departments to begin working on the projects listed in the final Senate Document. The other parts of § 9 merely harmonize the Act with existing laws and set out separate appropriations for Army and Interior to begin "the partial accomplishment of the works to be undertaken under said expanded plans," §§ 9(d) and (e), which indicates that this entire section of the Act encompasses only the necessary ministerial details to allow action to begin on the specified projects.

If there were any room for believing that § 9(a) implicitly modified the jurisdictional provisions that were plainly set forth in the preceding sections of the Act, or for doubting that it instead approved a different division of authority from that suggested in the Pick Plan and the Sloan Plan, one item in the legislative history puts this supposition entirely to rest. The original House version of the Act included language almost identical to the suggestions made in the two plans, see *infra*, at 511–512, which obliged the Interior Secretary "to prescribe regulations" for the use of water stored in Army reservoirs for irrigation. Hearings on H. R. 4485 before a Subcommittee of the Senate Committee on Commerce, 78th Cong., 2d Sess., 2 (1944). Secretary Ickes testified at the Senate Hearings on the proposed bill that this approach did not relate very well to the reclamation laws because it "disregards the problem of allocating costs for multiple-purpose facilities serving other uses in addition to irrigation." *Id.*, at 458. He proposed replacing that approach instead with the language currently contained in § 8 of the Act, which was eventually enacted by Congress. *Id.*, at 313. As noted

above, § 8 now provides that Army controls the main-stem reservoir projects and Interior controls all such additional irrigation works as it may "construct, operate, and maintain" at the site of those main-stem projects. One need not draw all the inferences that may be justified by this piece of legislative history in order to make it decisive here, for at the very least it directly refutes the notion that the other sections of the Act were intended to effect no changes in the division of authority between Army and Interior that had been suggested in the Pick Plan and the Sloan Plan.

Moreover, even if § 9(a) had been intended to adopt every aspect of the functional division of authority between the two Departments that had been proposed in the Pick and Sloan Plans, this section would not provide Interior with the authority to withdraw water unilaterally from Lake Oahe for irrigation and other uses in flat contradiction of § 8 of the Act. Contrary to the petitioners' argument in this case, nothing in those two plans indicates that control over individual reservoirs was to be divided among various departments of the Federal Government. The Pick Plan, for example, emphasized that although the Department of War was willing to coordinate its activities with Interior in order to serve "the broad and important interests and responsibilities" of both agencies, "[i]t is essential, however, that the main-stem projects be built, operated, and maintained by the Corps of Engineers." H. R. Doc., at 3–4. The War Department noted that although it would retain control of those reservoir projects, it accepted that "utilization of storage reserved for irrigation" in those reservoirs "should be in accordance with [Interior] regulations." *Id.*, at 4.[6] But this accession is not

[6] In its comments on the Pick Plan, Interior endorsed this approach, stating that the Army "Corps of Engineers should construct, operate, and maintain any feature in which flood control and navigation are dominant considerations, and the [Interior's] Bureau of Reclamation should construct, operate, and maintain any feature in which the functions of irrigation, restoration of surface and ground water levels, and power are domi-

at all the same as dividing control between the two agencies over the reservoir projects or the water stored in those projects, which was not contemplated in the Pick Plan. The Sloan Plan basically agreed with the approach set out in the Pick Plan, recognizing that the agency "with primary interest in the dominant function of any feature proposed in the plan should construct and operate that feature, giving full recognition, in the design, construction, and operation, to the needs of other agencies with minor interests." S. Doc., at 11. The Sloan Plan recognized that the "dominant function" of Lake Oahe and the other main-stem reservoir projects would be flood control and navigation, and therefore these projects would come under the jurisdiction of the Army and its Corps of Engineers. *Id.*, at 4.[7] Even if Congress had intended to write the jurisdictional structure suggested in the Pick Plan and the Sloan Plan directly into law, therefore, it would not have extended to Interior the unilateral authority that has been claimed in this case.

The petitioners also point to § 9(c) of the Act as lending support to its argument. That section states that "the reclamation and power developments to be undertaken by the

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nant," though the two Departments would "advise and consult with" one another to the extent that these interests overlapped in features controlled by one or the other Department. H. R. Doc., at 7.

[7] The self-styled "joint engineering report" contained in the final Senate Document that effected a reconciliation of the Pick and Sloan Plans did not shed any further light on how the administrative jurisdictions of the two Departments were to be circumscribed, but merely observed that the engineering features of the two plans were brought into agreement by applying the principles that the Army Corps of Engineers "should have the responsibility for determining main stem reservoir capacities and capacities of tributary reservoirs for flood control and navigation," and the Bureau of Reclamation "should have the responsibility for determining the reservoir capacities on the main stem and tributaries of the Missouri River for irrigation." S. Doc. No. 247, 78th Cong., 2d Sess., 1 (1944). This passage seems to be nothing more than an explanation of how the final number of projects and the amount of their storage capacities were reached by the representatives of the two Departments.

Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws." As noted already, under the reclamation laws the Interior Secretary is authorized to reallocate water under his control for industrial use as he sees fit. See n. 4, *supra*. By its terms, however, § 9(c) applies only to "the reclamation and power developments" undertaken by the Interior Secretary under the Act: that is, to the "transmission lines and related facilities" that § 5 authorizes the Interior Secretary "to construct or acquire" for transmitting and disposing of electric power, and to the "irrigation works" that § 8 authorizes the Interior Secretary "to construct, operate, and maintain" under the reclamation laws. This provision merely stipulates that the reclamation laws, which typically apply to other Interior projects, see 43 U. S. C. § 371 *et seq.* (1946 ed.), also apply to all the projects that Interior may undertake under the Flood Control Act. But as the District Court found, and as is readily apparent, the reservoir project engineered by the Army at Oahe is neither a "power development" nor a "reclamation development" that has been undertaken by the Interior Secretary. 586 F. Supp., at 1273–1278.[8] On the facts of this case, § 9(c)

[8] The petitioners contend that the term "reclamation . . . developmen[t]" in § 9(c) can encompass either the entire reservoir project at Oahe or the activities that Interior might undertake to dispose of water stored at Oahe for irrigation. Neither suggestion is tenable. The construction of the main-stem dam and reservoir project at Oahe was undertaken and controlled by the Army, and the District Court found this to be true as a matter of fact; thus Oahe cannot be a "reclamation . . . developmen[t] to be undertaken by the Secretary of the Interior." And the suggestion that the term "reclamation . . . developmen[t]" may refer to activities rather than projects is wrong for several reasons. First, the whole term is "reclamation and power developments to be undertaken by the Secretary of the Interior." These developments, which were set out more specifically in the Pick and Sloan Plans, plainly refer to the only developments that the Act identifies Interior as undertaking: the "power developments" ("transmission lines and related facilities") identified in § 5, and the "reclamation developments" ("irrigation works") identified in § 8. Second, the term "reclamation . . . developmen[t]" used in § 9(c) of the Act is linked by peti-

clearly does not extend any authority to Interior to withdraw water from Lake Oahe by other means than those stated in the Act.[9]

Not only do the language, structure, and legislative history of the Act fail to support the petitioners in this case, but the substance of their position is also difficult to fathom. The

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tioners to § 9(c) of the Reclamation Project Act of 1939, 53 Stat. 1193, as set forth in 43 U. S. C. § 485h(c) (1946 ed.), which is said to give Interior the authority to contract to dispose of this water, yet that statutory section itself limits Interior's authority by stating that such authority may not be used to "impair the efficiency *of the project* for irrigation purposes." *Ibid.* (emphasis added). Thus this same account relates the terms "development" and "project." Third, the integral nature of the relation between these two terms is shown by further consideration of the Reclamation Project Act § 2(*i*), 43 U. S. C. § 485a(*i*) (1946 ed.), which defines the term "development unit" as "a part of a project which, for purposes of orderly engineering or reclamation development, is designated as a development unit by order of the Secretary." Thus a "reclamation development" is a designated part of a "reclamation project" under the Reclamation Project Act, for administrative purposes, and the two terms are used almost synonomously in that Act. See § 485f(b).

[9] Petitioners suggest that their reading of the Act is supported by Congress' enactment of § 212 of the Reclamation Reform Act of 1982, 43 U. S. C. § 390*ll*. That provision, however, works no change in any of the substantive provisions of the Flood Control Act, and specifically does not purport to modify § 8 of the Act, which states the manner in which water may be withdrawn from Lake Oahe for use in irrigation. Section 212(a) merely was intended "to eliminate the shadow of applicability of the reclamation law to Corps of Engineers projects in any case in which the intent of Congress concerning such applicability is not clearly and explicitly set forth in statutory language," S. Rep. No. 97–373, p. 16 (1982), which it was not in § 8 of the Act. Section 212(b) simply ensures that the Interior Secretary's "authority to contract with water user entities for the irrigation water deliveries from Corps of Engineers projects, and to collect appropriate charges for those deliveries, continues in effect." *Ibid.* It says nothing about when and how the Interior Secretary possesses and exercises the authority to enter into such contracts, which is prescribed in § 8 of the Act. Even more to the point, § 212 does not indicate in any way that the Interior Secretary has the authority to enter into a contract to withdraw water from an Army reservoir for industrial use, which is the precise authority asserted in this case.

petitioners claim that the administrative structure established in the Act divides authority over Lake Oahe between Army and Interior in a novel fashion that is considerably different from what appears on the face of the Act. One possibility, which the petitioners disavow, is that Interior has the ultimate authority to use water from the reservoir for irrigation purposes and Army has the ultimate authority to use water from the reservoir for flood control and navigational purposes. This approach obviously would founder, and could give rise to endless squabbles, unless the water in the reservoir has been allocated between these uses, yet the District Court explicitly found "no evidence that separate allocations were made at Oahe," and "one wonders how the Interior Department is to control what cannot be identified." 586 F. Supp., at 1277. The position actually urged by the petitioners is even less straightforward than the foregoing: they argue that the Act *requires* Interior *to consult with* Army before withdrawing any water for industrial use from Lake Oahe, and *does not allow* Interior to withdraw water *if Army objects*, and yet the Act *does not require* Interior *to obtain the approval* of Army in order to withdraw water for industrial use. Tr. of Oral Arg. 14–15. The Army's authority over Lake Oahe is thus to be understood as most closely analogous to an executive veto over legislation: Interior must offer its proposal to the Army, and cannot proceed on its own if the Army objects, but can proceed even without Army approval as long as Army does not object. This would be, to say the least, a most unusual approach to administrative jurisdiction, one that gains no support from the text of the Act, and one that we are unwilling to read into the Act as an implicit modification of its otherwise sensible and intelligible provisions.

C

The petitioners finally contend that this Court should defer to the Interior Secretary's interpretation of the authority granted to him under the Act, which the Army apparently

has acquiesced in at least for the purposes of this litigation. The petitioners also point to what they describe as a tradition of cooperation between these two Departments in the Missouri River Basin, including a period between 1975 and 1978 when they entered into a joint agreement that allowed the Interior Secretary, "both on his own behalf and as agent for the Secretary of the Army, [to] contract for the marketing of water for industrial uses" from the six main-stem reservoirs.[10] The District Court disagreed with this historical account of the relations between Interior and the Army on this subject, and concluded that when "the chief attorneys for the two departments affected by a statute disagree, neither enjoys any deference." 586 F. Supp., at 1280. The Court of Appeals discussed this issue very briefly, but the gist of its holding was simply that Interior's interpretation did not even constitute a reasonable reading of the Act. 787 F. 2d, at 287.[11]

It is unnecessary to consider the petitioners' contention that deference to the Interior Secretary is appropriate in this case and their related arguments about the history of relations between Army and Interior under the Act, for even if Interior's interpretation of the Act would be entitled to any

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[10] This "Memorandum of Understanding" declared that the Army Secretary "shall retain all operational and managerial control over said reservoirs." Memorandum of Understanding Between Secretary of Interior and Secretary of Army, AR900072 (Feb. 24, 1975), App. 136. Over the four years it was in effect, no contracts were executed under it, and the agreement was allowed to expire in 1978. It also appears, by all accounts, that the contract at issue in this case is the only instance of the Interior Secretary exercising unilateral authority to withdraw water for industrial uses from a reservoir project controlled by the Army.

[11] Both the District Court and the Court of Appeals mentioned various reasons why the Interior Secretary's interpretation of the Act might not be entitled to deference even if it were a reasonable interpretation. But since in the end the District Court, like the Court of Appeals, concluded that the agency's decision was not "reasonable," 586 F. Supp., at 1280, its additional comments, like those of the Court of Appeals, were pure dictum, and there is no reason to address them here.

deference in these circumstances, the Executive Branch is not permitted to administer the Act in a manner that is inconsistent with the administrative structure that Congress enacted into law. As this Court has stated in a recent opinion on the proper limits of deference to an agency's construction of the statute which it administers: "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984). The Flood Control Act speaks directly to the dispute in this case, and congressional intent as expressed in the Act indicates clearly that the Interior Secretary may not enter into a contract to withdraw water from an Army reservoir for industrial use without the approval of the Department of the Army. That is "the end of the matter." *Id.*, at 842.

The decision of the Court of Appeals is therefore affirmed.

It is so ordered.

JUSTICE KENNEDY took no part in the consideration or decision of this case.

DEPARTMENT OF THE NAVY *v.* EGAN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 86-1552. Argued December 2, 1987—Decided February 23, 1988

Title 5 U. S. C., Ch. 75, provides a "two-track" system for undertaking "adverse actions" against certain Government employees. An employee removed for "cause," §§ 7511–7514, has a right of appeal to the Merit Systems Protection Board (Board), § 7513(d), that includes a hearing. The Board reviews such removals under a preponderance of the evidence standard. § 7701. An employee is also subject to summary removal based on national security concerns. Such a removal is not appealable to the Board, but the employee has certain specified procedural rights, including a hearing by an agency authority. § 7532. Respondent was removed from his laborer's job at a submarine facility after the Navy denied him a required security clearance. Without a security clearance, respondent was not eligible for any job at the facility. Upon respondent's appeal of his removal under § 7513(d), the Board's presiding official reversed the Navy's decision, holding that the Board had the authority to review the merits of the underlying security-clearance determination and that the Navy had failed to show that it reached a reasonable and warranted decision on this question. The full Board reversed and sustained the Navy's removal action, but the Court of Appeals reversed and remanded, holding that, since the Navy had chosen to remove respondent under § 7512 rather than § 7532, review under § 7513 applied, including review of the merits of the underlying security-clearance determination.

Held: In an appeal pursuant to § 7513, the Board does not have authority to review the substance of an underlying security-clearance determination in the course of reviewing an adverse action. Pp. 526–534.

(a) The grant or denial of security clearance to a particular employee is a sensitive and inherently discretionary judgment call that is committed by law to the appropriate Executive Branch agency having the necessary expertise in protecting classified information. It is not reasonably possible for an outside, nonexpert body to review the substance of such a judgment, and such review cannot be presumed merely because the statute does not expressly preclude it. Pp. 526–530.

(b) The statute's express language and structure confirm that it does not confer broad authority on the Board to review security-clearance determinations. A clearance denial is not one of the enumerated "adverse actions" that are subject to Board review, and nothing in the

Act directs or empowers the Board to go beyond determining whether "cause" for a denial existed, whether in fact clearance was denied, and whether transfer to a nonsensitive position was feasible. The application of § 7701's preponderance of the evidence standard to security-clearance determinations would inevitably alter the "clearly consistent with the interests of the national security" standard normally applied in making such determinations and would involve the Board in second-guessing an agency's national security determinations, a result that it is extremely unlikely Congress intended. Respondent's argument that the availability of the alternative § 7532 summary removal procedure compels a conclusion of reviewability, since an anomalous situation would otherwise exist whereby the more "drastic" § 7532 remedy would actually entitle a removed employee to greater procedural protections—particularly to a preremoval trial-type hearing—than would § 7513, is unpersuasive. Section 7532 provides a procedure that is harsh and drastic both for the employee and for the agency head, who must act personally in suspending and removing the employee, and removal thereunder, even as envisioned by respondent, would not have amounted to "more" procedural protection than respondent received under § 7513. The procedures under the two sections are not anomalous, but merely different. Pp. 530–534.

802 F. 2d 1563, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, and SCALIA, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 534. KENNEDY, J., took no part in the consideration or decision of the case.

Deputy Solicitor General Cohen argued the cause for petitioner. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Willard*, *Michael K. Kellogg*, *Barbara L. Herwig*, and *Freddi Lipstein*.

William J. Nold argued the cause and filed a brief for respondent.*

**Daniel J. Popeo*, *Paul D. Kamenar*, and *Todd Natkin* filed a brief for the Washington Legal Foundation as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union Foundation et al. by *John A. Powell*, *Helen Hershkoff*, and *Steven R. Shapiro*; for the American Federation of Labor and Congress of Industrial Organizations by *George Kaufmann* and *Laurence*

JUSTICE BLACKMUN delivered the opinion of the Court.

Respondent Thomas M. Egan lost his laborer's job at the Trident Naval Refit Facility in Bremerton, Wash., when he was denied a required security clearance. The narrow question presented by this case is whether the Merit Systems Protection Board (Board) has authority by statute to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action. The Board ruled that it had no such authority. The Court of Appeals for the Federal Circuit, by a divided vote, reversed. We granted certiorari because of the importance of the issue in its relation to national security concerns. 481 U. S. 1068 (1987).

I

Respondent Egan was a new hire and began his work at the facility on November 29, 1981. He served as a veteran's-preference-eligible civilian employee of the Navy subject to the provisions of the Civil Service Reform Act of 1978 (Act), 5 U. S. C. § 1201 *et seq.*

The mission of the Refit Facility is to provide quick-turnaround repair, replenishment, and systems check-out of the Trident submarine over its extended operating cycle. The Trident is nuclear-powered and carries nuclear weapons. It has been described as the most sophisticated and sensitive weapon in the Navy's arsenal and as playing a crucial part in our Nation's defense system. See *Concerned About Trident* v. *Schlesinger*, 400 F. Supp. 454, 462–466 (DC 1975), aff'd in part and rev'd in part, 180 U. S. App. D. C. 345, 555 F. 2d 817 (1977). As a consequence, *all* employee positions at the Refit Facility are classified as sensitive. Thus, as shown on his Standard Form, a condition precedent to Egan's retention of his employment was "satisfactory completion of security and medical reports."

Gold; for the National Federation of Federal Employees by *Patrick J. Riley;* and for Ralph B. Bogdanowicz by *Stuart A. Kirsch* and *Mark D. Roth.*

In April 1982, respondent gained the "noncritical-sensitive" position of laborer leader.[1] Pending the outcome of his security investigation, however, he performed only limited duties and was not permitted to board any submarine.

On February 16, 1983,[2] the Director of the Naval Civilian Personnel Command issued a letter of intent to deny respondent a security clearance. This was based upon California and Washington state criminal records reflecting respondent's convictions for assault and for being a felon in possession of a gun, and further based upon his failure to disclose on his application for federal employment two earlier convictions for carrying a loaded firearm. The Navy also referred to respondent's own statements that he had had drinking problems in the past and had served the final 28 days of a sentence in an alcohol rehabilitation program.

Respondent was informed that he had a right to respond to the proposed security-clearance denial. On May 6, he answered the Navy's letter of intent, asserting that he had paid his debt to society for his convictions, that he had not listed convictions older than seven years because he did not interpret the employment form as requiring that information, and that alcohol had not been a problem for him for three years preceding the clearance determination. He also provided favorable material from supervisors as to his background and character.

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[1] A "noncritical-sensitive" position is defined to include "[a]ccess to Secret or Confidential information." Chief of Naval Operations Instructions (OPNAVINST) 5510.1F, ¶16–101–2.b (June 15, 1981). OPNAVINST 5510.1F was amended in April 1984 and is now OPNAVINST 5510.1G.

[2] This date is of some significance for by then respondent had been employed at the facility for more than a year. Title 5 U. S. C. § 7511(a)(1)(A) defines an "employee" as "an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less." There is no dispute concerning respondent's status as an employee within the meaning of § 7511(a)(1)(A).

The Director, after reviewing this response, concluded that the information provided did not sufficiently explain, mitigate, or refute the reasons on which the proposed denial was based. Accordingly, respondent's security clearance was denied.

Respondent took an appeal to the Personnel Security Appeals Board, but his removal was effected before that Board acted (which it eventually did by affirming the denial of clearance).

Without a security clearance, respondent was not eligible for the job for which he had been hired. Reassignment to a nonsensitive position at the facility was not possible because there was no nonsensitive position there. Accordingly, the Navy issued a notice of proposed removal, and respondent was placed on administrative leave pending final decision. Respondent did not reply to the notice. On July 15, 1983, he was informed that his removal was effective July 22.

Respondent, pursuant to 5 U. S. C. § 7513(d), sought review by the Merit Systems Protection Board.[3] Under § 7513(a), an agency may remove an employee "only for such cause as will promote the efficiency of the service." The statute, together with § 7701 to which § 7513(d) specifically refers, provides the employee with a number of procedural protections, including notice, an opportunity to respond and be represented by counsel, and a decision in writing. The employee, unless he is a nonveteran in the excepted service, may appeal the agency's decision to the Board, as respondent did, which is to sustain the action if it is "supported by a preponderance of the evidence." § 7701(c)(1)(B).[4] The

[3] Section 7513(d) reads: "An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title."

[4] We note at this point the presence of 5 U. S. C. § 7532. Under § 7532(a), the "head of an agency," "[n]otwithstanding other statutes," may suspend an employee "when he considers that action necessary in the interests of national security." After complying with specified procedures, the agency head may remove the suspended employee when "he determines

stated "cause" for respondent's removal was his failure to meet the requirements for his position due to the denial of security clearance. Before the Board, the Government argued that the Board's review power was limited to determining whether the required removal procedures had been followed and whether a security clearance was a condition for respondent's position. It contended that the Board did not have the authority to judge the merits of the underlying security-clearance determination.

The Board's presiding official reversed the agency's decision, ruling that the Board did have authority to review the merits. She further ruled that the agency must specify the precise criteria used in its security-clearance decision and must show that those criteria are rationally related to national security. App. to Pet. for Cert. 62a–63a. The agency then must show, by a preponderance of the evidence, that the employee's acts precipitating the denial of his clearance actually occurred, and that his "alleged misconduct has an actual or potentially detrimental effect on national security interests." *Id.*, at 63a. The official then held that the ultimate burden was upon the agency to persuade the Board of the appropriateness of its decision to deny clearance. *Id.*, at 64a.

The official concluded that it was not possible to determine whether the Navy's denial of respondent's security clearance was justified because it had not submitted a list of the criteria it employed and because it did not present evidence that it had "conscientiously weighed the circumstances surrounding [respondent's] alleged misconduct and reasonably balanced it against the interests of national security." *Id.*, at 65a. She accordingly concluded that the Navy had "failed to show it reached a reasonable and warranted decision concerning the

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that removal is necessary or advisable in the interests of national security." His determination then is "final." § 7532(b). Removal under § 7532 is not subject to Board review. § 7512(A). In respondent's case the Navy did not invoke § 7532; his removal, therefore, presumably would be subject to Board review as provided in § 7513.

propriety of the revocation of [respondent's] security clearance." *Id.*, at 66a. The decision to remove respondent, therefore, could not stand.

The Navy petitioned for full Board review of the presiding official's ruling.[5] In a unanimous decision, the Board reversed the presiding official's ruling and sustained the agency's removal action. 28 M. S. P. R. 509 (1985). It observed that §§ 7512 and 7513 "do not specifically address the extent of the Board's review of the underlying determinations." 28 M. S. P. R., at 514. Neither did the legislative history of the Act "address the extent of the authority Congress intended the Board to exercise in reviewing revocations or denials of security clearances which result in Chapter 75 actions." *Id.*, at 515. The Board found no binding legal precedent. It acknowledged the presence of the decision in *Hoska* v. *Department of Army*, 219 U. S. App. D. C. 280, 677 F. 2d 131 (1982) (security clearance revocation leading to dismissal reviewed on its merits), but explained that case away on the ground that the court did not "expressly address the Board's authority to review the underlying reasons for the agency's security clearance determination." 28 M. S. P. R., at 516. Thus, earlier Board cases that had relied upon *Hoska*, see, *e. g.*, *Bogdanowicz* v. *Department of Army*, 16 M. S. P. R. 653 (1983), involved a "reliance misplaced," and the holding that they stood "for the proposition that the Board has the authority to review the propriety of the agency's . . . denial of a security clearance" was "now overrule[d]." 28 M. S. P. R., at 516. It went on to say that

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[5] The Solicitor General informs us, see Brief for Petitioner 6, that the Board had before it numerous petitions for review raising similar issues of law, and treated the present litigation as the lead case. The Board had invited and received briefs from interested agencies, employee organizations, and others concerning the proper scope of its review and whether § 7532, see n. 4, *supra*, is the exclusive authority for a removal based upon national security concerns. See 49 Fed. Reg. 48623–48624 (1984); 50 Fed. Reg. 2355 (1985).

"section 7532 is not the exclusive basis for removals based upon security clearance revocations." *Id.*, at 521.

Respondent, pursuant to § 7703, appealed to the Court of Appeals for the Federal Circuit. By a divided vote, that court reversed the Board's decision that it had no authority to review the merits of a security-clearance determination underlying a removal. 802 F. 2d 1563 (1986). It agreed with the Board that § 7532 is not the sole authority for a removal based upon national security concerns. 802 F. 2d, at 1568. It noted, however, that the agency had chosen to remove respondent under § 7512 rather than § 7532 and thus that it chose the procedure "that carrie[d] Board review under section 7513," 802 F. 2d, at 1569, including review of the merits of the underlying agency determination to deny a security clearance. The court then remanded the case to the Board for such review, stating that the question of an appropriate remedy, should the Board now rule that a security clearance was improperly denied, was not yet ripe. *Id.*, at 1573–1575.

The dissenting judge in the Court of Appeals concluded that respondent had received all the procedural protections to which he was entitled, *id.*, at 1577–1578; that the majority in effect was transferring a discretionary decision vested in an executive agency to a body that had neither the responsibility nor the expertise to make that decision; that the ruling raised separation-of-powers concerns; and that the Board would be unable to provide an appropriate remedy. *Id.*, at 1578, 1580–1583.

II

We turn first to the statutory structure. Chapter 75 of Title 5 of the United States Code is entitled "Adverse Actions." Its subchapter II (§§ 7511–7514) relates to removals for "cause." Subchapter IV (§§ 7531–7533) relates to removals based upon national security concerns. An employee removed for "cause" has the right, under § 7513(d), to appeal to the Board. In contrast, an employee suspended under

§ 7532(a) is not entitled to appeal to the Board. That employee, however, is entitled to specified preremoval procedural rights, including a hearing by an agency authority. § 7532(c)(3).

Chapter 77 of Title 5 (§§ 7701–7703) is entitled "Appeals," and Chapter 12 (§§ 1201–1209) relates to the "Merit Systems Protection Board and Special Counsel." Section 1205(a) provides that the Board shall "hear, adjudicate, or provide for the hearing or adjudication of all matters within the jurisdiction of the Board" and shall "order any Federal agency or employee to comply with any order or decision issued by the Board." In the present litigation, there is no claim that the Board did not have jurisdiction to hear and adjudicate respondent's appeal.

It is apparent that the statutes provide a "two-track" system. A removal for "cause" embraces a right of appeal to the Board and a hearing of the type prescribed in detail in § 7701. Suspension and removal under § 7532, however, entail no such right of appeal. Respondent takes the straightforward position that, inasmuch as this case proceeded under § 7513, a hearing before the Board was required. The Government agrees. What is disputed is the subject matter of that hearing and the extent to which the Board may exercise reviewing authority. In particular, may the Board, when § 7513 is pursued, examine the merits of the security-clearance denial, or does its authority stop short of that point, that is, upon review of the fact of denial, of the position's requirement of security clearance, and of the satisfactory provision of the requisite procedural protections?

III

The Court of Appeals' majority stated: "The absence of any statutory provision precluding appellate review of security clearance denials in section 7512 removals creates a strong presumption in favor of appellate review," citing *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 141 (1967). 802 F. 2d,

at 1569. One perhaps may accept this as a general proposition of administrative law, but the proposition is not without limit, and it runs aground when it encounters concerns of national security, as in this case, where the grant of security clearance to a particular employee, a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive Branch.

The President, after all, is the "Commander in Chief of the Army and Navy of the United States." U. S. Const., Art. II, § 2. His authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant. See *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 890 (1961). This Court has recognized the Government's "compelling interest" in withholding national security information from unauthorized persons in the course of executive business. *Snepp* v. *United States*, 444 U. S. 507, 509, n. 3 (1980). See also *United States* v. *Robel*, 389 U. S. 258, 267 (1967); *United States* v. *Reynolds*, 345 U. S. 1, 10 (1953); *Totten* v. *United States*, 92 U. S. 105, 106 (1876). The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief.

Since World War I, the Executive Branch has engaged in efforts to protect national security information by means of a classification system graded according to sensitivity. See Note, Developments in the Law—The National Security Interest and Civil Liberties, 85 Harv. L. Rev. 1130, 1193–1194 (1972). After World War II, certain civilian agencies, including the Central Intelligence Agency, the National Security Agency, and the Atomic Energy Commission, were en-

trusted with gathering, protecting, or creating information bearing on national security. Presidents, in a series of Executive Orders, have sought to protect sensitive information and to ensure its proper classification throughout the Executive Branch by delegating this responsibility to the heads of agencies. See Exec. Order No. 10290, 3 CFR 789 (1949–1953 Comp.); Exec. Order No. 10501, 3 CFR 979 (1949–1953 Comp.); Exec. Order No. 11652, 3 CFR 678 (1971–1975 Comp.); Exec. Order No. 12065, 3 CFR 190 (1979); Exec. Order No. 12356, § 4.1(a), 3 CFR 174 (1983). Pursuant to these directives, departments and agencies of the Government classify jobs in three categories: critical sensitive, noncritical sensitive, and nonsensitive. Different types and levels of clearance are required, depending upon the position sought. A Government appointment is expressly made subject to a background investigation that varies according to the degree of adverse effect the applicant could have on the national security. See Exec. Order No. 10450, § 3, 3 CFR 937 (1949–1953 Comp.).

It should be obvious that no one has a "right" to a security clearance. The grant of a clearance requires an affirmative act of discretion on the part of the granting official. The general standard is that a clearance may be granted only when "clearly consistent with the interests of the national security." See, *e. g.*, Exec. Order No. 10450, §§ 2 and 7, 3 CFR 936, 938 (1949–1953 Comp.); 10 CFR § 710.10(a) (1987) (Department of Energy); 32 CFR § 156.3(a) (1987) (Department of Defense). A clearance does not equate with passing judgment upon an individual's character. Instead, it is only an attempt to predict his possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, he might compromise sensitive information. It may be based, to be sure, upon past or present conduct, but it also may be based upon concerns completely unrelated to conduct,

such as having close relatives residing in a country hostile to the United States. "[T]o be denied [clearance] on unspecified grounds in no way implies disloyalty or any other repugnant characteristic." *Molerio* v. *FBI*, 242 U. S. App. D. C. 137, 146, 749 F. 2d 815, 824 (1984). The attempt to define not only the individual's future actions, but those of outside and unknown influences renders the "grant or denial of security clearances . . . an inexact science at best." *Adams* v. *Laird*, 136 U. S. App. D. C. 388, 397, 420 F. 2d 230, 239 (1969), cert. denied, 397 U. S. 1039 (1970).

Predictive judgment of this kind must be made by those with the necessary expertise in protecting classified information. For "reasons . . . too obvious to call for enlarged discussion," *CIA* v. *Sims*, 471 U. S. 159, 170 (1985), the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it. Certainly, it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk. The Court accordingly has acknowledged that with respect to employees in sensitive positions "there is a reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee who has access to such information." *Cole* v. *Young*, 351 U. S. 536, 546 (1956). As noted above, this must be a judgment call. The Court also has recognized "the generally accepted view that foreign policy was the province and responsibility of the Executive." *Haig* v. *Agee*, 453 U. S. 280, 293–294 (1981). "As to these areas of

Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities." *United States* v. *Nixon*, 418 U. S. 683, 710 (1974). Thus, unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs. See, *e. g.*, *Orloff* v. *Willoughby*, 345 U. S. 83, 93–94 (1953); *Burns* v. *Wilson*, 346 U. S. 137, 142, 144 (1953); *Gilligan* v. *Morgan*, 413 U. S. 1, 10 (1973), *Schlesinger* v. *Councilman*, 420 U. S. 738, 757–758 (1975); *Chappell* v. *Wallace*, 462 U. S. 296 (1983).

We feel that the contrary conclusion of the Court of Appeals' majority is not in line with this authority.

IV

Finally, we are fortified in our conclusion when we consider generally the statute's "express language" along with "the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 345 (1984).

The Act by its terms does not confer broad authority on the Board to review a security-clearance determination. As noted above, the Board does have jurisdiction to review "adverse actions," a term, however, limited to a removal, a suspension for more than 14 days, a reduction in grade or pay, and a furlough of 30 days or less. §§ 7513(d), 7512. A denial of a security clearance is not such an "adverse action," and by its own force is not subject to Board review. An employee who is removed for "cause" under § 7513, when his required clearance is denied, is entitled to the several procedural protections specified in that statute. The Board then may determine whether such cause existed, whether in fact clearance was denied, and whether transfer to a nonsensitive position was feasible. Nothing in the Act, however, directs or empowers the Board to go further. Cf. *Zimmer-*

man v. *Department of Army*, 755 F. 2d 156 (CA Fed. 1985); *Buriani* v. *Department of Air Force*, 777 F. 2d 674, 677 (CA Fed. 1985); *Bacon* v. *Department of Housing & Urban Development*, 757 F. 2d 265, 269–270 (CA Fed. 1985); *Madsen* v. *VA*, 754 F. 2d 343 (CA Fed. 1985).[6]

As noted above, security clearance normally will be granted only if it is "clearly consistent with the interests of the national security." The Board, however, reviews adverse actions under a preponderance of the evidence standard. § 7701(c)(1)(B). These two standards seem inconsistent. It is difficult to see how the Board would be able to review security-clearance determinations under a preponderance of the evidence standard without departing from the "clearly consistent with the interests of the national security" test. The clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials. Placing the burden on the Government to support the denial by a preponderance of the evidence would inevitably shift this emphasis and involve the Board in second-guessing the agency's national security determinations. We consider it ex-

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[6] Prior to the Act's passage in 1978, most federal employees dismissed for cause could pursue an appeal to the Civil Service Commission. The parties here appear to agree that the old Commission never exercised jurisdiction over a security-clearance determination. We fail to see any indication that Congress intended to grant the Board greater jurisdiction in this respect than that possessed by the Civil Service Commission. The Board was created to assume the adjudicatory functions of the old Commission and, with certain exceptions, those functions passed unchanged from the Commission to the Board. When the Senate and House Committees listed the changes effected by the Act, they gave no indication that an agency's security-clearance determination was now to be subject to review. See S. Rep. No. 95–969, pp. 46 and 52 (1978); H. R. Rep. No. 95–1403, pp. 21, 22 (1978). Such changes as were made did not bear upon the issue. If there be any contrary implication in the legislative history, as respondent would suggest, it is much too frail for us to conclude that Congress intended a major change of that kind.

tremely unlikely that Congress intended such a result when it passed the Act and created the Board.

Respondent presses upon us the existence of § 7532 with its provision for an employee's summary removal. The Court of Appeals' majority concluded that § 7532 was not the exclusive means for removal on national security grounds. 802 F. 2d, at 1568.[7] The parties to the present litigation are in no dispute about the alternative availability of § 7513 or § 7532. They assume, as the Federal Circuit held, that § 7532 does not pre-empt § 7513 and that the two statutes stand separately and provide alternative routes for administrative action. There is no reason for us to dispute that conclusion here for, in this respect, we accept the case as it comes to us.

Respondent points out the Government's acknowledgment that the remedy under § 7532 is "drastic" in that the employee may be suspended summarily and thereafter removed after such investigation and review as the agency head considers necessary; in that neither the suspension nor the removal is subject to outside review; in that the employee is not eligible for any other position in the agency and may not be appointed to a position elsewhere in the Government without consultation with the Office of Personnel Management; and in that the section requires the head of the agency to act personally. At the same time, respondent would say, as did the Court of Appeals, 802 F. 2d, at 1572, that the Board's deci-

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[7] But cf. *Doe* v. *Weinberger*, 261 U. S. App. D. C. 96, 101, 820 F. 2d 1275, 1280 (1987), cert. pending *sub nom. Carlucci* v. *Doe*, No. 87–751. If the District of Columbia Circuit's holding in *Doe* (to the effect that § 7532 is not merely "an extra option," 261 U. S. App. D. C., at 101, 820 F. 2d, at 1280, for the removal of an employee of the National Security Agency, to which 50 U. S. C. §§ 831 and 832 apply) is pertinent with respect to the Navy's power to dismiss an employee for cause under § 7513, that ruling would conflict with the Federal Circuit's holding in the present case that the Navy may proceed under § 7513. This Court will meet the issue in *Doe* when it comes to it. We decide the present case on the parties' assumption that § 7513 was available to the Navy in this case and that it proceeded thereunder.

sion in the present case suggests an anomaly in that an employee removed under § 7513 is entitled to less process than one removed under § 7532. The argument is that the availability of the § 7532 procedure is a "compelling" factor in favor of Board review of a security-clearance denial in a case under § 7513. We are not persuaded.

We do not agree that respondent would have received greater procedural protections under § 7532 than he received in the present case. Respondent received notice of the reasons for the proposed denial, an opportunity to inspect all relevant evidence, a right to respond, a written decision, and an opportunity to appeal to the Personnel Security Appeals Board. Until the time of his removal, he remained on full-pay status. His removal was subject to Board review that provided important protections outlined above. In contrast, had he been removed under § 7532, he would have received notice to "the extent that the head of the agency determines that the interests of national security permit," a hearing before an agency board, and a decision by the head of the agency. He could have been suspended without pay pending the outcome. He would not have been entitled to any review outside the agency, and, once removed, he would have been barred from employment with the agency. In short, § 7532, instead, provides a procedure that is harsh and drastic both for the employee and for the agency head, who must act personally in suspending and removing the employee. See §§ 7532(a) and (b).

Respondent's argument that the Board's decision in this case creates an anomaly seems to come down to his contention that, had he been removed under § 7532, he would have been entitled to a trial-type hearing prior to his removal. Even assuming he would be entitled to such a hearing under § 7532, however, we would still consider the two procedures not anomalous, but merely different. As explained above, we doubt whether removal under § 7532, even as envisioned

by respondent, would have amounted to "more" procedural protection.

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE KENNEDY took no part in the consideration or decision of this case.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

It cannot be denied that the Government has a "compelling interest" in safeguarding the Nation's secrets. See *ante*, at 527. I see no necessity for this Court to rewrite the civil service statutes in the name of national security, however, since those statutes already provide a procedure that protects sensitive information without depriving federal employees such as respondent of a hearing into the underlying reasons for their discharge.

The parties do not dispute that respondent was discharged from his civilian "laborer leader" position with the U. S. Navy pursuant to subchapter II of the Civil Service Reform Act, 5 U. S. C. §§ 7511–7514. A federal agency may discharge an employee under those statutory provisions "only for such cause as will promote the efficiency of the service." § 7513(a). The employee is entitled to appeal the agency's action to the Merit Systems Protection Board. § 7513(d). The Board must afford the employee "a hearing for which a transcript will be kept." § 7701(a)(1). The employee's discharge is to be sustained by the Board only if "supported by a preponderance of the evidence." § 7701(c)(1)(B).

There is nothing in these statutory provisions to suggest that the Board is to scrutinize discharges on national security grounds any less comprehensively than other discharges for "cause." Nor does the legislative history of these provisions suggest that the Board is foreclosed from examining the reasons underlying the discharges of employees who are alleged to be security risks.

If Congress had remained silent on the subject of national security discharges throughout the Civil Service Reform Act, I might feel compelled to read into the foregoing provisions some restrictions on the scope of Board review of such discharges. It might be appropriate in such circumstances to assume that Congress intended that such restrictions be inferred by the Board and the courts.

Congress did not remain silent, however, with regard to national security discharges. Rather, Congress carefully provided an alternative procedure to be used when the Government determines that an employee's removal is "necessary or advisable in the interests of national security." 5 U. S. C. § 7532(b). The employee is entitled under this procedure to "a written statement of the charges against him," "an opportunity . . . to answer the charges and submit affidavits," "a hearing . . . by an agency authority duly constituted for this purpose," "a review of his case by the head of the agency or his designee," and "a written statement of the decision of the head of the agency." § 7532(c). The decision of the agency head is "final." § 7532(b). It is not disputed that the Navy could have proceeded against respondent under § 7532.

The sensible inference to be drawn from Congress' enactment of the procedural protections of § 7532 for employees discharged "in the interests of national security" and its silence with regard to the procedures applicable to similarly motivated discharges under other sections of the civil service statutes is that Congress intended to guarantee every discharged employee a hearing into the "cause" for his removal. If the employee is discharged under § 7532, he is entitled to a hearing before his own agency; if the employee is discharged under other provisions of Title 5, he is entitled to a hearing before the Board.

Yet, the majority's decision frustrates this congressional intent by denying any meaningful hearing to employees such as respondent who are discharged on national security grounds under provisions other than § 7532. In such cases,

the employing agency has no statutory obligation to afford the employee a hearing, and the Board now need determine only "whether in fact [a security] clearance was denied, and whether transfer to a nonsensitive position was feasible." *Ante*, at 530. Hence, the employee cannot demand a hearing into claims that he was branded a security risk based on false allegations or on reasons that lack any rational nexus to national security concerns.

It is difficult to reconcile today's decision with the Court's discussion in *Greene* v. *McElroy*, 360 U. S. 474 (1959), of the procedural protections available to an employee of a Government contractor who had been denied a security clearance based on his alleged Communist associations and sympathies:

> "Before we are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. Such decisions cannot be assumed by acquiescence or non-action. They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, . . . but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws." *Id.*, at 507 (citations omitted).

It is far from clear in the instant circumstances that Congress or the President has decided that discharging alleged security risks without any sort of hearing is "necessary or warranted" or has explicitly authorized such a procedure. Instead, the majority assumes such a result from congressional "nonaction." For example, the majority emphasizes that "[n]othing in the [Civil Service Reform] Act . . . directs or

empowers the Board to go further" than to determine whether a security clearance was indeed denied and whether transfer to a nonsensitive position was possible. *Ante*, at 530. There is likewise nothing in the Act, however, that directs the Board *not* to "go further."

Today's result is not necessary to protect the Nation's secrets. If an agency fears that the Board will not be sufficiently sensitive to the national security implications of a discharge decision,[1] the agency may foreclose external review of that decision by proceeding against the employee under § 7532. The agency would be required in such circumstances, however, to afford the employee an internal hearing into the reasons for his termination. The agency could not discharge the employee, as the Navy did here, without affording him any hearing into the merits of his discharge.

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[1] There is no reason to assume that the Board would be insensitive to national security concerns. It is questionable whether the Board would often have to consider sensitive information in determining whether an agency had cause to discharge an employee on national security grounds. No such information appears to have been at issue in the instant case. Moreover, in those cases in which sensitive information would have to be considered, the Board could be expected to adopt procedures (*e. g., in camera* inspection of classified documents) similar to those utilized by the courts in similar circumstances. It appears that the courts have previously adjudicated cases involving denials of security clearances without any documented harm to national security. See, *e. g.*, *Hoska* v. *United States Department of Army*, 219 U. S. App. D. C. 280, 677 F. 2d 131 (1982); *Gayer* v. *Schlesinger*, 160 U. S. App. D. C. 172, 490 F. 2d 740 (1973); *McKeand* v. *Laird*, 490 F. 2d 1262 (CA9 1973). Finally, given the requirement of Executive Order No. 10450, 3 CFR 937 (1949–1953 Comp.), that security clearances be granted only if "clearly consistent with the interests of the national security," I would assume that the Board's review of national security discharges would be suitably deferential to the employing agency even under the preponderance of the evidence standard prescribed by § 7701(c)(1)(B). It is questionable whether the Board's inquiry into such discharges would be qualitatively different from its inquiry into discharges for other varieties of "cause." The Board routinely evaluates such factors as loyalty, trustworthiness, and judgment in determining whether an employee's discharge will "promote the efficiency of the service."

The majority suggests that respondent would have received no more procedural protection under § 7532 than under § 7513 notwithstanding that he was guaranteed a hearing on the merits under the former provision but not under the latter. *Ante*, at 533. This conclusion does not show sufficient regard for our many decisions recognizing the particularly important role of the hearing in assuring that individuals are not wrongfully deprived of their livelihoods or other significant interests. See, *e. g.*, *Wolff* v. *McDonnell*, 418 U. S. 539, 557–558 (1974); *Perry* v. *Sindermann*, 408 U. S. 593, 603 (1972); *Stanley* v. *Illinois*, 405 U. S. 645, 652–658 (1972); *Goldberg* v. *Kelly*, 397 U. S. 254, 269–270 (1970). I cannot assume that the proceedings required under § 7532 would not provide an employee with a meaningful opportunity to be heard simply because they are conducted by an agency authority rather than by the Board.[2]

In sum, absent any indication that Congress or the President intended to deny federal employees discharged on national security grounds a full hearing before either the Board or their employing agency into the merits of their removal, I respectfully dissent.

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[2] The § 7532 procedure is not as "harsh and drastic" as the majority contends to either the employee or the agency head. The majority asserts that, if respondent had been discharged under § 7532, "he would have been barred from employment with the agency." *Ante*, at 533. Respondent, however, could have obtained other employment with the Navy even if he had been discharged under § 7532; the civil service statutes expressly authorize the reinstatement of persons removed under § 7532 "in the discretion of the head of the agency concerned." § 3571. It has never been suggested that the Navy would not rehire respondent for a position that does not require a security clearance. Moreover, while the majority asserts that the agency head "must act personally" to discharge an employee under § 7532, *ante*, at 533, the statute provides for final review of discharge decisions by "the head of the agency *or his designee*." § 7532(c)(3)(D) (emphasis added).

Syllabus

LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA ET AL. *v.* ADVANCED LIGHTWEIGHT CONCRETE CO., INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85–2079. Argued November 10, 1987—Decided February 23, 1988

An employer may have a contractual duty under a collective-bargaining agreement to make contributions to a pension fund during the agreement's term, and may also have a duty under the National Labor Relations Act (NLRA) to continue making such contributions after the agreement's expiration while negotiations for a new contract are in process. Section 515 of the Employee Retirement Income Security Act (ERISA) obligates an employer to pay to a multiemployer plan contributions that are required "under the terms of the plan or under the terms of a collectively bargained agreement." Section 502(g)(2) of ERISA authorizes the multiemployer plan's trustees to enforce such liability by bringing an action in federal district court for the unpaid contributions, prejudgment interest thereon, liquidated damages, reasonable attorney's fees and costs, and other appropriate relief. Respondent company was a party to two multiemployer collective-bargaining agreements that required monthly contributions to eight employee benefit plans. Respondent made the contributions until the agreements' expiration date, but made no contributions thereafter. The plans' trustees (hereinafter petitioners) brought suit against respondent to collect the postcontract contributions, alleging that respondent's actions constituted a breach of its duty to bargain in good faith under § 8(a)(5) of the NLRA, and that the Federal District Court had jurisdiction under §§ 502(g)(2) and 515 of ERISA. The court granted respondent summary judgment on the grounds that § 515 does not apply to an employer's obligation under § 8(a)(5) of the NLRA, and that the National Labor Relations Board (NLRB) has exclusive jurisdiction over petitioners' claims. The Court of Appeals affirmed.

Held: The remedy provided in §§ 515 and 502(g)(2) of ERISA is limited to contractual, "promised contributions," and does not confer jurisdiction on district courts to determine whether an employer's unilateral decision to refuse to make postcontract contributions violates the NLRA. Pp. 545–553.

(a) The text and the legislative history of §§ 515 and 502(g)(2) clearly require this result. Both § 515 and the legislative history plainly describe the employer's contractual obligation to make contributions but omit any reference to the noncontractual obligation imposed by the NLRA. Conversely, in defining the contribution obligation of an employer wishing to withdraw from a multiemployer plan, § 4212(a) of ERISA unambiguously includes both the employer's contractual obligations and its NLRA obligations, thereby demonstrating that Congress was aware of the two different sources of an employer's duty to contribute to covered plans. Pp. 545–549.

(b) Petitioners' policy arguments for broadly construing § 515 to include postcontract delinquencies are rejected in light of Congress' plain intent, as discussed above, and because countervailing policy arguments make it highly unlikely that the limited reach of the statute is the consequence of inadvertence rather than deliberate choice. Petitioners' first argument—that denying district courts jurisdiction of postcontract delinquency collection actions leaves a "gap" in the enforcement scheme—is unpersuasive, since there are indications that it may not be a problem of serious magnitude; since the issues that must be decided in a postcontract delinquency dispute are more complex than those that are presented in a simple collection action; and since the resolution of the type of question presented is usually left to the NLRB. Petitioners' second argument—that the remedies available in an NLRB proceeding are less effective than those in an ERISA action—may be correct, but is ultimately unavailing, since the asserted defects in NLRB remedies are characteristic of all unfair labor practice proceedings. The NLRA duty to make postcontract contributions is simply a consequence of a broader duty that was created to protect the collective-bargaining process, and does not provide ERISA plan trustees with a unique and preferred procedure for obtaining redress. Pp. 550–553.

779 F. 2d 497, affirmed.

STEVENS, J., delivered the opinion of the Court, in which all other Members joined, except KENNEDY, J., who took no part in the consideration or decision of the case.

Michael B. Roger argued the cause for petitioners. With him on the briefs were *Blythe Mickelson* and *Barry E. Hinkle*.

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Fried, Deputy Solicitor*

General Cohen, George R. Salem, Allen H. Feldman, and *Ellen L. Beard.*

Mark S. Ross argued the cause for respondent. With him on the brief were *Leonard L. Scheinholtz, Hollis T. Hurd,* and *Morton H. Orenstein.**

JUSTICE STEVENS delivered the opinion of the Court.

A company that is a party to a collective-bargaining agreement may have a contractual duty to make contributions to a pension fund during the term of the agreement and, in addition, may have a duty under the National Labor Relations Act (NLRA) to continue making such contributions after the expiration of the contract and while negotiations for a new contract are in process. In 1980, Congress amended the Employee Retirement Income Security Act (ERISA) to provide trustees of multiemployer benefit plans with an effective federal remedy to collect delinquent contributions. The question presented in this case is whether that remedy encompasses actions based on an alleged breach of the employer's statutory duty as well as those based on an alleged breach of contract. We agree with the Court of Appeals' conclusion that the remedy is limited to the collection of "promised contributions."

I

Prior to 1983, respondent was a member of the Associated General Contractors of California and a party to two multiemployer collective-bargaining agreements negotiated on its

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*Briefs of *amici curiae* urging reversal were filed for Carpenters Southern California Administrative Corporation by *Colin M. Long;* for the National Coordinating Committee for Multiemployer Plans by *Gerald M. Feder* and *David R. Levin;* and for the Tri-State U.F.C.W. and Employers Benefit Fund by *William P. Getty.*

Briefs of *amici curiae* urging affirmance were filed for the Associated General Contractors of America, Inc., by *A. J. Harper II, T. J. Wray,* and *David M. Thomas;* and for the Chamber of Commerce of the United States by *Stephen A. Bokat* and *Robin S. Conrad.*

behalf by that association.[1] The agreements included provisions requiring respondent to make monthly contributions to eight different employee benefit plans.[2] The collective-bargaining agreements, which were executed in 1980, had an expiration date of June 15, 1983.

On April 1, 1983, respondent notified both unions that it had terminated the association's authority to bargain on its behalf, that it would not be bound by either master agreement (or any successor agreement) after the June 15, 1983, expiration date, and that it was prepared to negotiate with the unions independently. Respondent continued to contribute to the eight trust funds until June 15, 1983, but has made no contributions since that date.

In December 1983, the trustees of the eight plans (petitioners)[3] brought suit in the Federal District Court for the Northern District of California against respondent to collect contributions for the period after June 15, 1983. Petitioners allege that respondent's unilateral decision to change the terms and conditions of employment by discontinuing its contributions constituted a breach of its duty to bargain in good faith and violated § 8(a)(5) of the NLRA. 61 Stat. 141, 29

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[1] One agreement was with the District Council of Plasterers and Cement Masons of Northern California and the other was with the Northern California District Council of Laborers.

[2] Those eight plans are: The Laborers Health and Welfare Trust Fund for Northern California; the Laborers Pension Trust Fund for Northern California; the Laborers Vacations-Holiday-Dues Trust Fund for Northern California; the Laborers Training and Retraining Trust Funds for Northern California; the Cement Masons' Health and Welfare Trust Fund for Northern California; the Cement Masons Pension Trust Fund for Northern California; the Cement Masons Vacation-Holiday-Supplemental Dues Trust Fund for Northern California; and the Cement Masons Apprenticeship and Training Trust Fund for Northern California Fund.

[3] The named parties are the plans, rather than the trustees, but the relevant statute refers to an action "by a fiduciary for or on behalf of a plan." 29 U. S. C. § 1132(g)(2).

U. S. C. § 158(a)(5). The complaints alleged that the federal court had jurisdiction under §§ 502(g)(2) and 515 of ERISA.[4]

Respondent's answer to the complaint challenged the District Court's jurisdiction and also denied that respondent had any statutory duty to make contributions to the funds because its negotiations with the unions had reached an "impasse."[5] The "impasse" issue has never been resolved

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[4] "As a general rule, federal courts do not have jurisdiction over activity [that] is 'arguably subject to § 7 or § 8 of the [NLRA],' and they 'must defer to the exclusive competence of the National Labor Relations Board.' " *Kaiser Steel Corp.* v. *Mullins*, 455 U. S. 72, 83 (1982) (quoting *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 245 (1959)). We have also held, however, that "federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies . . . ." *Connell Construction Co.* v. *Plumbers & Steamfitters*, 421 U. S. 616, 626 (1975). The question in this case is whether Congress has provided, through ERISA §§ 502(g)(2) and 515, such an "independent federal remedy."

The complaints also alleged jurisdiction under § 301 of the Labor Management Relations Act (LMRA), 61 Stat. 156, 29 U. S. C. § 185, but petitioners now rely entirely on ERISA to support federal jurisdiction.

[5] As the Court of Appeals correctly stated:

" 'Impasse' is an imprecise term of art:

"The definition of an 'impasse' is understandable enough—that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless—but its application can be difficult. Given the many factors commonly itemized by the Board and courts in impasse cases, perhaps all that can be said with confidence is that an impasse is a 'state of facts in which the parties, despite the best of faith, are simply deadlocked.' The Board and courts look to such matters as the number of meetings between the company and the union, the length of those meetings and the period of time that has transpired between the start of negotiations and their breaking off. There is no magic number of meetings, hours or weeks which will reliably determine when an impasse has occurred.

"R. Gorman, Basic Text on Labor Law: Unionization and Collective Bargaining 448 (1976) (citation omitted)." 779 F. 2d 497, 500, n. 3 (CA9 1985).

If the parties were indeed at an impasse, then the employer's statutory duty to maintain the status quo during postcontract negotiations, see n. 6, *infra*, would end. See, *e. g.*, *American Ship Building Co.* v. *NLRB*, 380

because the District Court granted a motion for summary judgment based on two other grounds: That § 515 of ERISA does not apply to an employer's obligations under § 8(a)(5) of the NLRA; and that the National Labor Relations Board (NLRB) has exclusive jurisdiction over petitioners' claims.

The Court of Appeals affirmed. 779 F. 2d 497 (CA9 1985). It necessarily assumed that petitioner could prove that respondent's postcontract refusal to contribute to the funds was an unfair labor practice.[6] It held, however, that the claims should be resolved by the NLRB rather than by a federal district court. After examining the text and the legislative history of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), the Court concluded:

U. S. 300, 318 (1965) (no unfair labor practice "when, after a bargaining impasse has been reached, [employer] temporarily shuts down his plant and lays off his employees for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position"); *Taft Broadcasting Co.*, 163 N. L. R. B. 475, 478 (1967) ("[A]fter bargaining to an impasse, that is, after good-faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his preimpasse proposals"), aff'd *sub nom. American Federation of Television & Radio Artists* v. *NLRB*, 129 U. S. App. D. C. 399, 395 F. 2d 622 (1968). Here, since the District Court determined on motion for summary judgment that it had no jurisdiction to entertain plaintiffs' unfair labor practice claim, the factually disputed impasse issue was never resolved.

[6] "Freezing the status quo ante after a collective agreement has expired promotes industrial peace by fostering a non-coercive atmosphere that is conducive to serious negotiations on a new contract. Thus, an employer's failure to honor the terms and conditions of an expired collective-bargaining agreement pending negotiations on a new agreement constitutes bad faith bargaining in breach of sections 8(a)(1), 8(a)(5) and 8(d) of the National Labor Relations Act . . . . *NLRB v. Katz*, 369 U. S. 736, 743 . . . (1962). Consequently, any unilateral change by the employer in the pension fund arrangements provided by an expired agreement is an unfair labor practice. *Peerless Roofing Co. v. NLRB*, 641 F. 2d 734, 735 (9th Cir. 1981); *Producer's Dairy Delivery Co. v. Western Conference of Teamsters Pension Trust Fund*, 654 F. 2d 625, 627 (9th Cir. 1981)." 779 F. 2d, at 500.

> "We find no persuasive evidence in either the plain words or legislative history of ERISA or the MPPAA that Congress intended section 515 to be an exception to the general rule of NLRB preemption for that narrow category of suits seeking recovery of unpaid contributions accrued during the period between contract expiration and impasse." *Id.*, at 505.[7]

We granted certiorari, 479 U. S. 1083 (1987), and now affirm.

II

In its 1980 amendments to ERISA, Congress responded to two concerns that are relevant to the question presented by this case. It was primarily concerned about the burden placed upon the remaining contributors to a multiemployer fund when one or more of them withdraw.[8] In response to this concern Congress enacted an elaborate provision imposing "withdrawal liability" on such withdrawing employers.[9] That liability arises when an employer ceases to have an "obligation to contribute" to the plan.[10] That term is defined for the purposes of the withdrawal liability portion of the statute in language that unambiguously includes both the employer's

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[7] All other Courts of Appeals that have addressed this issue have reached the same result. See *New Bedford Fishermen's Welfare Fund* v. *Baltic Enterprises, Inc.*, 813 F. 2d 503 (CA1 1987); *Moldovan* v. *Great Atlantic & Pacific Tea Co.*, 790 F. 2d 894, 900–901 (CA3 1986); *U.A. 198 Health & Welfare, Education & Pension Funds* v. *Rester Refrigeration Service, Inc.*, 790 F. 2d 423 (CA5 1986).

[8] See MPPAA § 3(a)(4), 94 Stat. 1209, 29 U. S. C. § 1001a (a)(4).

[9] See MPPAA § 104, 94 Stat. 1217–1244, 29 U. S. C. §§ 1381–1405.

[10] Section 4203(a) of ERISA provides:

"For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer—

"(1) permanently ceases to have an obligation to contribute under the plan, or

"(2) permanently ceases all covered operations under the plan." 94 Stat. 1218, 29 U. S. C. § 1383(a).

Neither petitioners nor respondent suggests that respondent has withdrawn from the plans.

contractual obligations and any obligation imposed by the NLRA.[11] That definition is significant because it demonstrates that Congress was aware of the two different sources of an employer's duty to contribute to covered plans.

Congress was also concerned about the problem that had arisen because a substantial number of employers had failed to make their "promised contributions" on a regular and timely basis.[12] Sections 515 and 502(g)(2) of ERISA, the provisions at issue in this case, were enacted in response to that concern. The text of § 515 plainly describes the employer's contractual obligation to make contributions but omits any reference to a noncontractual obligation imposed by the NLRA. Section 515 provides:

> "Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such

[11] Under the subhead "obligation to contribute; special rules," § 4212(a) of ERISA provides:

"For purposes of this part, the term 'obligation to contribute' means an obligation to contribute arising—

"(1) under one or more collective bargaining (or related) agreements, or

"(2) as a result of a duty under applicable labor-management relations law, but

"does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions." 94 Stat. 1233, 29 U. S. C. § 1392(a).

[12] "Delinquencies of employers in making required contributions are a serious problem for most multiemployer plans. Failure of employers to make *promised contributions* in a timely fashion imposes a variety of costs on plans. While contributions remain unpaid, the plan loses the benefit of investment income that could have been earned if the past due amounts had been received and invested on time. Moreover, additional administrative costs are incurred in detecting and collecting delinquencies. Attorneys fees and other legal costs arise in connection with collection efforts." Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 43 (Comm. Print 1980) (emphasis added).

contributions in accordance with the terms and conditions of such plan or such agreement." 94 Stat. 1295, 29 U. S. C. § 1145.

The liability created by § 515 may be enforced by the trustees of a plan by bringing an action in federal district court pursuant to § 502. The special remedy against employers who are delinquent in meeting their contractual obligations that is created by § 502(g)(2) includes a mandatory award of prejudgment interest plus liquidated damages in an amount at least equal to that interest, as well as attorney's fees and costs.[13]

The legislative history of these provisions explains that Congress added these strict remedies to give employers a strong incentive to honor their contractual obligations to contribute and to facilitate the collection of delinquent accounts.[14]

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[13] Section 502(g)(2) provides:

"In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—

"(A) the unpaid contributions,

"(B) interest on the unpaid contributions,

"(C) an amount equal to the greater of—

"(i) interest on the unpaid contributions, or

"(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

"(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

"(E) such other legal or equitable relief as the court deems appropriate.

"For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code of 1954." 94 Stat. 1295, 29 U. S. C. § 1132(g)(2).

[14] "Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses *unrelated to the employer's promise* and the plans' entitlement to the contribu-

That history contains no mention of the employer's statutory duty to make postcontract contributions while negotiations for a new contract are being conducted.[15] Thus, both the

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tions. This should not be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously. Sound national pension policy demands that employers who *enter into agreements* providing for pension contributions not be permitted to repudiate their *pension promises*." Committee Print, *supra* n. 12, at 44 (emphases added).

See also n. 15, *infra*.

[15] Petitioners rely on selected excerpts of legislative history, but none refers to the NLRA duty, and some actually tend to disprove petitioners' case. Senator Williams, Chairman of the Senate Committee on Labor and Human Resources, remarked on the Senate floor that "[o]n this whole question of delinquent contributions and the withdrawal liability collection, the bill provides a direct and I suggest unambiguous cause of action under ERISA to a plan against a delinquent employer." 126 Cong. Rec. 20180 (1980). This statement does not address the issue of the source of the employer's obligations. Representative Thompson, Chairman of the House Education and Labor Committee, explained similarly that § 515 would provide "a direct, unambiguous ERISA cause of action to a plan against a delinquent employer." *Id.*, at 23039. He added:

"The public policy of this legislation to foster the preservation of the private multiemployer plan system necessitates that provision be made to discourage delinquencies and simplify delinquency collection. *The bill imposes a Federal statutory duty to contribute on employers that are already obligated to make contributions to multiemployer plans.* A plan sponsor that prevails in any action to collect delinquent contributions will be entitled to recover the delinquent contributions, court costs, attorney's fees, interest on the contributions owed and liquidated damages. *The intent of this section is to promote the prompt payment of contributions and assist plans in recovering the costs incurred in connection with delinquencies.*" *Ibid.* (emphases added).

Petitioners add the emphases in their brief, but even the highlighted sentences do not speak to the issue of the source of an employer's obligations.

In fact, parts of Representative Thompson's statement not excerpted by petitioners tend to disprove their case. At one point, he stated that "[f]ailure of employers to make *promised* contributions in a timely fashion imposes a variety of costs on plans." *Ibid.* (emphasis added). A bit later, he exclaimed that "[s]ound national pension policy demands that employers *who enter into agreements* providing for pension contributions not be per-

text and the legislative history of §§ 515 and 502(g)(2) provide firm support for the Court of Appeals' conclusion that this remedy is limited to the collection of "promised contributions" and does not confer jurisdiction on district courts to determine whether an employer's unilateral decision to refuse to make postcontract contributions constitutes a violation of the NLRA.[16]

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mitted to *repudiate their pension promises.*" *Ibid.* (emphases added). Immediately following, he cited, "[i]n this regard," five judicial decisions, endorsing three and criticizing two. As respondent correctly explains, all five cases "concerned extraneous matters interposed as defenses to a clear contractual obligation arising during the term of the labor agreement." Brief for Respondent 18, n. 11. That is, none dealt with a statutory, postcontract obligation. See *Lewis* v. *Benedict Coal Corp.*, 361 U. S. 459 (1960) (union's promises not conditions precedent to employer's promise to pay royalties to fund; decision endorsed); *Lewis* v. *Mill Ridge Coals, Inc.*, 298 F. 2d 552 (CA6 1962) (employer owes contributions to fund under labor agreement regardless of alleged failure of consideration; decision endorsed); *Huge* v. *Long's Hauling Co.*, 590 F. 2d 457 (CA3 1978) (employer owes contributions to fund under labor agreement regardless of alleged union antitrust violation and unfair labor practices; decision endorsed); *Western Washington Laborers-Employers Health & Security Trust Fund* v. *McDowell*, 103 LRRM 2219 (WD Wash. 1979) (failure of union to achieve majority status relieves employer of obligation to contribute under prehire agreement; decision criticized); *Washington Area Carpenters' Welfare Fund* v. *Overhead Door Co.*, 488 F. Supp. 816 (DC 1980) (same), rev'd, 220 U. S. App. D. C. 273, 681 F. 2d 1 (1982), cert. denied, 461 U. S. 926 (1983). See also 126 Cong. Rec. 23288 (1980) (floor statement of Sen. Williams, identical to that of Rep. Thompson).

[16] Petitioners advance three unpersuasive arguments for the opposite conclusion. First, petitioners offer an alternative reading of what they deem § 515's "operative phrase," *i. e.*, "employer who is obligated to make contributions . . . under the terms of a collectively bargained agreement." Petitioners suggest that this language "can be read to refer to employers whose contributions are *defined and measured by the terms* of a collective-bargaining agreement, but whose obligation to contribute exists as a matter of law, independent of the contract. So read, Section 515 would require employers to adhere to all legal duties to make contributions to collectively-bargained plans." Brief for Petitioners 14 (emphasis in original). In other words, petitioners construe the word "under" to mean "defined and measured by," and read "obligated" to include both contractual

III

Petitioners, supported by the United States as *Amicus Curiae*, advance two policy arguments for giving § 515 a broad construction that would include postcontract delinquencies. First, they argue that the reasons for giving a dis-

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and statutory duties. But if Congress had meant to say this surely it could have done so more clearly; as written, § 515 plainly refers to obligations that themselves arise from either a "plan" or a "collectively bargained agreement."

Petitioners next point out that ERISA § 4301(b) provides that "[i]n any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 515)." 94 Stat. 1263, 29 U. S. C. § 1451(b). Because of this "statutory linkage" between the remedies available for withdrawal and delinquency liability, petitioners contend, "it is appropriate and instructive in gleaning the intended scope of the Section 515 duty to examine how Congress defined the obligation to contribute for withdrawal liability purposes." Brief for Petitioners 21. Since withdrawal liability may arise from either a contractual or a statutory duty, see ERISA § 4212(a), n. 11, *supra*, petitioners conclude that delinquency liability must be similarly engendered.

It is easy to see that this argument is a false syllogism, for it reasons from the fact that Congress intended withdrawal and delinquency liability to have similar *remedies* to the erroneous conclusion that withdrawal and delinquency liability are themselves equivalent because both originated in contractual and statutory duties. As we have explained in the text, though, § 4212(a) actually cuts against petitioners, since it makes clear that while withdrawal liability may arise from both contractual and statutory duties, § 515 provides only for a contractual origin for delinquency liability.

Finally, petitioners maintain that if § 515 "were read to apply only to obligations imposed by collective bargaining agreements, the section would be entirely duplicative of Section 301 of the LMRA, 29 U. S. C. § 185, which creates a federal cause of action for the breach of such contracts." Brief for Petitioners 24. But, as respondent points out, "this argument conveniently ignores the specific purpose of Section 515." Brief for Respondent 22. That is, the new § 502(g)(2) remedies of mandatory prejudgment interest, liquidated damages equal at least to that interest, and attorney's fees and costs, plus such other relief as the court deems appropriate, are indeed "the potent new weapon previously unavailable to plans under" § 301 of the LMRA. Brief for Respondent 23.

trict court jurisdiction of collection actions apply to postcontract delinquencies as well as those arising during the term of the contract and that it is unwise to leave a "gap" in the enforcement scheme. Second, they argue that the remedies available in NLRB proceedings are inadequate.

Our principal reason for rejecting these arguments is our conviction that Congress' intent is so plain that policy arguments of this kind must be addressed to the body that has the authority to amend the legislation, rather than one whose authority is limited to interpreting it. We nevertheless note that there are countervailing policy arguments that make it highly unlikely that the limited reach of the statute is the consequence of inadvertence rather than deliberate choice.

With respect to the asserted "gap" in the enforcement scheme, three observations are pertinent. First, the incidence of the asserted gap is unknown. Presumably most employers who anticipate a continuing relationship with a union honor their obligations to preserve the status quo during negotiations for a new contract. If a new contract is ultimately signed, it should define the employer's obligations during the period subsequent to the expiration of the preceding contract; therefore, any delinquency during that period would be covered by § 515. On the other hand, if no new contract is ever signed, there is at least a possibility that an impasse had been reached either before, or only a short time after, the expiration of the old contract. The fact that this type of delinquency appears not even to have been called to the attention of Congress indicates that it may not be a problem of serious magnitude.[17]

Second, the issues that must be decided in a dispute over an employer's refusal to make any postcontract contributions are more complex than those that are presented in a simple collection action. Whereas it is entirely appropriate to

[17] Even petitioners concede that "most collection actions are brought to enforce an existing collective bargaining agreement." Brief for Petitioners 6; see *id.*, at 13.

award prejudgment interest or liquidated damages as a remedy for an employer's failure to make the payments specified in a contract, those remedies are problematic in cases in which there is a good-faith dispute over both the existence and the extent of the employer's liability. The question whether and when an impasse has been reached is often a matter of judgment based on an evaluation of the parties' bargaining history against standards that are imprecise at best.[18]

Third, whether an employer's unilateral decision to discontinue contributions to a pension plan constitutes a violation of the statutory duty to bargain in good faith is the kind of question that is routinely resolved by the administrative agency with expertise in labor law. There are situations in which district judges must occasionally resolve labor issues, but they surely represent the exception rather than the rule. In cases like this, which involve either an actual or an "arguable" violation of § 8 of the NLRA, federal courts typically defer to the judgment of the NLRB. See *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 245 (1959).[19]

Petitioners may be correct in contending that the remedies available in an NLRB proceeding are less effective than an ERISA action would be. Under ERISA they are entitled to attorney's fees, prejudgment interest, and liquidated dam-

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[18] See n. 5, *supra*. Other employer defenses that raise complex factual and legal questions may also be asserted. In this case, for example, respondent avers that "issues exist concerning the unions' waiver of bargaining rights and their failure to satisfy their statutory bargaining obligations under Section 8(b)(3) of the NLRA." Brief for Respondent 36 (footnote omitted).

[19] See n. 4, *supra*. It is true, as petitioners point out, that district courts may find it necessary to decide whether an impasse occurred in withdrawal liability cases in which there is a dispute over the date of withdrawal. In such a proceeding, however, there would not normally be any claim that the employer was guilty of an unfair labor practice or that liquidated damages were mandated because the employer misjudged the impasse date.

ages, whereas the scope of relief available in an NLRB proceeding is often a matter of agency discretion. Moreover, an unfair labor practice charge must be filed within a 6-month period and the general counsel has discretion to refuse to issue a complaint if she is not persuaded that the charge has merit or is of sufficient importance to justify prosecution. Finally, the employer and the union may enter into a settlement that either reduces, or even might waive, the employer's postcontract obligations to contribute to the pension fund.

But these asserted defects in petitioners' labor law remedy are characteristic of all unfair labor practice proceedings before the NLRB. If the labor legislation were simply repealed, *in toto*, petitioners would have no basis whatsoever for claiming that an employer had any duty to continue making contributions to a fund after the expiration of its contractual commitment to do so. The duty that does exist is simply a consequence of a broader labor law duty that was created to protect the collective-bargaining process. Unilateral changes in the terms and conditions of employment are prohibited, not to vindicate the interests that motivated the enactment of § 515 in 1980, but rather to carry out the purposes of the NLRA. The net effect of the labor law duties imposed on employers by that legislation provides a substantial benefit to ERISA plan trustees, but Congress has not provided them with a unique and preferred procedure for obtaining redress for an employer's violation of its duty to bargain with the union.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE KENNEDY took no part in the consideration or decision of this case.

UNITED STATES *v.* OWENS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 86–877. Argued November 4, 1987—Decided February 23, 1988

As a result of injuries suffered in an attack at a federal prison, correctional counselor John Foster's memory was severely impaired. Nevertheless, in an interview with the investigating FBI agent, Foster described the attack, named respondent as his attacker, and identified respondent from photographs. At respondent's Federal District Court trial for assault with intent to commit murder, Foster testified, *inter alia*, that he clearly remembered so identifying respondent. On cross-examination, however, he admitted that he could not remember seeing his assailant, seeing any of his numerous hospital visitors except the FBI agent, or whether any visitor had suggested that respondent was the assailant. Defense counsel unsuccessfully sought to refresh his recollection with hospital records, including one indicating that he had attributed the assault to someone other than respondent. Respondent was convicted, but the Court of Appeals reversed, upholding challenges based on the Confrontation Clause of the Sixth Amendment and Rule 802 of the Federal Rules of Evidence, which generally excludes hearsay.

Held: Neither the Confrontation Clause nor Rule 802 is violated by admission of a prior, out-of-court identification statement of a witness who is unable, because of memory loss, to explain the basis for the identification. Pp. 557–564.

(a) The Confrontation Clause, which guarantees only an *opportunity* for effective cross-examination, not successful cross-examination, is satisfied where, as here, the defendant has a full and fair opportunity to bring out the witness' bad memory and other facts tending to discredit his testimony. Cf. *Delaware* v. *Fensterer*, 474 U. S. 15. This analysis is not altered by the fact that the testimony here involved an out-of-court identification that would traditionally be categorized as hearsay, since the Confrontation Clause's requirements are satisfied when a hearsay declarant is present at trial, takes an oath, is subject to unrestricted cross-examination, and the jury has an opportunity to observe his demeanor. Pp. 557–561.

(b) The Court of Appeals erred in holding that Rule 801(d)(1)(C)—under which a prior identification statement is not hearsay if the declarant is "subject to cross-examination concerning the statement"—did not apply to Foster's identification statement because of his memory loss.

A more natural reading of the Rule is that a witness is "subject to cross-examination" when, as here, he is placed on the stand, under oath, and responds willingly to questions. Meaningful cross-examination within the Rule's intent is not destroyed by the witness' assertion of memory loss, which is often the very result sought to be produced by cross-examination, and which can be effective in destroying the force of the prior statement. Moreover, the Rule does not on its face require more than that the cross-examination "concer[n] the statement." The Advisory Committee's notes on the Rule, the Rule's legislative history, and the language of Rule 804(a)(3)—which, in defining "unavailability as a witness" to include memory-loss situations, demonstrates Congress' awareness of the recurrent evidentiary problem of witness forgetfulness—all support this reading of the Rule. Respondent's contention that this reading is impermissible because it creates an internal inconsistency in the Rules—*i. e.*, the forgetful witness who is deemed "subject to cross-examination" under Rule 801(d)(1)(C) is simultaneously deemed "unavailable" under Rule 804(a)(3)—is semantic rather than substantive. Because the characterizations in the two Rules were made for entirely different purposes, there is no requirement or expectation that they should coincide. Pp. 561–564.

789 F. 2d 750, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 564. KENNEDY, J., took no part in the consideration or decision of the case.

Deputy Solicitor General Bryson argued the cause for the United States. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Weld, Robert H. Klonoff*, and *John F. De Pue*.

Allan Ides, by invitation of the Court, 480 U. S. 929, argued the cause for respondent. With him on the brief was *Stanley A. Goldman*.

JUSTICE SCALIA delivered the opinion of the Court.

This case requires us to determine whether either the Confrontation Clause of the Sixth Amendment or Rule 802 of the Federal Rules of Evidence bars testimony concerning a prior, out-of-court identification when the identifying witness is

unable, because of memory loss, to explain the basis for the identification.

I

On April 12, 1982, John Foster, a correctional counselor at the federal prison in Lompoc, California, was attacked and brutally beaten with a metal pipe. His skull was fractured, and he remained hospitalized for almost a month. As a result of his injuries, Foster's memory was severely impaired. When Thomas Mansfield, an FBI agent investigating the assault, first attempted to interview Foster, on April 19, he found Foster lethargic and unable to remember his attacker's name. On May 5, Mansfield again spoke to Foster, who was much improved and able to describe the attack. Foster named respondent as his attacker and identified respondent from an array of photographs.

Respondent was tried in Federal District Court for assault with intent to commit murder under 18 U. S. C. § 113(a). At trial, Foster recounted his activities just before the attack, and described feeling the blows to his head and seeing blood on the floor. He testified that he clearly remembered identifying respondent as his assailant during his May 5th interview with Mansfield. On cross-examination, he admitted that he could not remember seeing his assailant. He also admitted that, although there was evidence that he had received numerous visitors in the hospital, he was unable to remember any of them except Mansfield, and could not remember whether any of these visitors had suggested that respondent was the assailant. Defense counsel unsuccessfully sought to refresh his recollection with hospital records, including one indicating that Foster had attributed the assault to someone other than respondent. Respondent was convicted and sentenced to 20 years' imprisonment to be served consecutively to a previous sentence.

On appeal, the United States Court of Appeals for the Ninth Circuit considered challenges based on the Confronta-

tion Clause and Rule 802 of the Federal Rules of Evidence.[1] By divided vote it upheld both challenges (though finding the Rule 802 violation harmless error), and reversed the judgment of the District Court. 789 F. 2d 750 (1986). We granted certiorari, 479 U. S. 1084 (1987), to resolve the conflict with other Circuits on the significance of a hearsay declarant's memory loss both with respect to the Confrontation Clause, see, *e. g.*, *United States ex rel. Thomas* v. *Cuyler*, 548 F. 2d 460, 462–463 (CA3 1977), and with respect to Rule 802, see, *e. g.*, *United States* v. *Lewis*, 565 F. 2d 1248, 1252 (CA2 1977), cert. denied, 435 U. S. 973 (1978).

II

The Confrontation Clause of the Sixth Amendment gives the accused the right "to be confronted with the witnesses against him." This has long been read as securing an adequate opportunity to cross-examine adverse witnesses. See, *e. g.*, *Mattox* v. *United States*, 156 U. S. 237, 242–243 (1895); *Douglas* v. *Alabama*, 380 U. S. 415, 418 (1965). This Court has never held that a Confrontation Clause violation can be founded upon a witness' loss of memory, but in two cases has expressly left that possibility open.

In *California* v. *Green*, 399 U. S. 149, 157–164 (1970), we found no constitutional violation in the admission of testimony that had been given at a preliminary hearing, relying on (as one of two independent grounds) the proposition that the opportunity to cross-examine the witness at trial satisfied the Sixth Amendment's requirements. We declined, however, to decide the admissibility of the same witness' out-of-court statement to a police officer concerning events that at trial he was unable to recall. In remanding on this point, we

[1] This case has been argued, both here and below, as though Federal Rule of Evidence 801(d)(1)(C) were the basis of the challenge. That is substantially but not technically correct. If respondent's arguments are accepted, it is Rule 802 that would render the out-of-court statement inadmissible as hearsay; but as explained in Part III, it is ultimately Rule 801(d)(1)(C) that determines whether Rule 802 is applicable.

noted that the state court had not considered, and the parties had not briefed, the possibility that the witness' memory loss so affected the petitioner's right to cross-examine as to violate the Confrontation Clause.[2] *Id.*, at 168–169. Justice Harlan, in a scholarly concurrence, stated that he would have reached the issue of the out-of-court statement, and would have held that a witness' inability to "recall either the underlying events that are the subject of an extra-judicial statement or previous testimony or recollect the circumstances under which the statement was given, does not have Sixth Amendment consequence." *Id.*, at 188.

In *Delaware* v. *Fensterer*, 474 U. S. 15 (1985) *(per curiam)*, we determined that there was no Confrontation Clause violation when an expert witness testified as to what opinion he had formed, but could not recollect the basis on which he had formed it. We said:

> "The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony." *Id.*, at 21–22.

Our opinion noted that a defendant seeking to discredit a forgetful expert witness is not without ammunition, since the jury may be persuaded that "his opinion is as unreliable as his memory." *Id.*, at 19. We distinguished, however, the unresolved issue in *Green* on the basis that that involved the introduction of an out-of-court statement. 474 U. S., at 18.

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[2] On remand, the California Supreme Court concluded that the Confrontation Clause was not violated by the out-of-court statement, because the declarant testified under oath, subject to cross-examination, and the jury was able to observe his demeanor. *People* v. *Green*, 3 Cal. 3d 981, 479 P. 2d 998, cert. dism'd, 404 U. S. 801 (1971).

JUSTICE STEVENS, concurring in the judgment, suggested that the question at hand was in fact quite close to the question left open in *Green*. 474 U. S., at 23–24.

Here that question is squarely presented, and we agree with the answer suggested 18 years ago by Justice Harlan. "[T]he Confrontation Clause guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *Kentucky* v. *Stincer*, 482 U. S. 730, 739 (1987), quoting *Fensterer*, *supra*, at 20 (emphasis added); *Delaware* v. *Van Arsdall*, 475 U. S. 673, 679 (1986); *Ohio* v. *Roberts*, 448 U. S. 56, 73, n. 12 (1980). As *Fensterer* demonstrates, that opportunity is not denied when a witness testifies as to his current belief but is unable to recollect the reason for that belief. It is sufficient that the defendant has the opportunity to bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination, see 3A J. Wigmore, Evidence § 995, pp. 931–932 (J. Chadbourn rev. 1970)) the very fact that he has a bad memory. If the ability to inquire into these matters suffices to establish the constitutionally requisite opportunity for cross-examination when a witness testifies as to his current belief, the basis for which he cannot recall, we see no reason why it should not suffice when the witness' past belief is introduced and he is unable to recollect the reason for that past belief. In both cases the foundation for the belief (current or past) cannot effectively be elicited, but other means of impugning the belief are available. Indeed, if there is any difference in persuasive impact between the statement "I believe this to be the man who assaulted me, but can't remember why" and the statement "I don't know whether this is the man who assaulted me, but I told the police I believed so earlier," the former would seem, if anything, more damaging and hence give rise to a greater need for memory-testing, if that is to be considered essential to an opportunity for effective cross-

examination. We conclude with respect to this latter example, as we did in *Fensterer* with respect to the former, that it is not. The weapons available to impugn the witness' statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional guarantee. They are, however, realistic weapons, as is demonstrated by defense counsel's summation in this very case, which emphasized Foster's memory loss and argued that his identification of respondent was the result of the suggestions of people who visited him in the hospital.

Our constitutional analysis is not altered by the fact that the testimony here involved an out-of-court identification that would traditionally be categorized as hearsay. See Advisory Committee's Notes on Fed. Rule Evid. 801(d)(1)(C), 28 U. S. C. App., p. 717. This Court has recognized a partial (and somewhat indeterminate) overlap between the requirements of the traditional hearsay rule and the Confrontation Clause. See *Green*, 399 U. S., at 155–156; *id.*, at 173 (Harlan, J., concurring). The dangers associated with hearsay inspired the Court of Appeals in the present case to believe that the Constitution required the testimony to be examined for "indicia of reliability," *Dutton* v. *Evans*, 400 U. S. 74, 89 (1970), or "particularized guarantees of trustworthiness," *Roberts*, *supra*, at 66. We do not think such an inquiry is called for when a hearsay declarant is present at trial and subject to unrestricted cross-examination. In that situation, as the Court recognized in *Green*, the traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness' demeanor satisfy the constitutional requirements. 399 U. S., at 158–161. We do not think that a constitutional line drawn by the Confrontation Clause falls between a forgetful witness' live testimony that he once believed this defendant to be the perpetrator of the crime, and the introduction of the witness' earlier statement to that effect.

Respondent has argued that this Court's jurisprudence concerning suggestive identification procedures shows the special dangers of identification testimony, and the special importance of cross-examination when such hearsay is proffered. See, *e. g.*, *Manson* v. *Brathwaite*, 432 U. S. 98 (1977); *Neil* v. *Biggers*, 409 U. S. 188 (1972). Respondent has not, however, argued that the identification procedure used here was in any way suggestive. There does not appear in our opinions, and we decline to adopt today, the principle that, because of the mere possibility of suggestive procedures, out-of-court statements of identification are inherently less reliable than other out-of-court statements.

III

Respondent urges as an alternative basis for affirmance a violation of Federal Rule of Evidence 802, which generally excludes hearsay. Rule 801(d)(1)(C) defines as not hearsay a prior statement "of identification of a person made after perceiving the person," if the declarant "testifies at the trial or hearing and is subject to cross-examination concerning the statement." The Court of Appeals found that Foster's identification statement did not come within this exclusion because his memory loss prevented his being "subject to cross-examination concerning the statement." Although the Court of Appeals concluded that the violation of the Rules of Evidence was harmless (applying for purposes of that determination a "more-probable-than-not" standard, rather than the "beyond-a-reasonable-doubt" standard applicable to the Confrontation Clause violation, see *Delaware* v. *Van Arsdall*, 475 U. S., at 684), respondent argues to the contrary.

It seems to us that the more natural reading of "subject to cross-examination concerning the statement" includes what was available here. Ordinarily a witness is regarded as "subject to cross-examination" when he is placed on the stand, under oath, and responds willingly to questions. Just as with the constitutional prohibition, limitations on the scope

of examination by the trial court or assertions of privilege by the witness may undermine the process to such a degree that meaningful cross-examination within the intent of the Rule no longer exists. But that effect is not produced by the witness' assertion of memory loss—which, as discussed earlier, is often the very result sought to be produced by cross-examination, and can be effective in destroying the force of the prior statement. Rule 801(d)(1)(C), which specifies that the cross-examination need only "concer[n] the statement," does not on its face require more.

This reading seems even more compelling when the Rule is compared with Rule 804(a)(3), which defines "[u]navailability as a witness" to include situations in which a declarant "testifies to a lack of memory of the subject matter of the declarant's statement." Congress plainly was aware of the recurrent evidentiary problem at issue here—witness forgetfulness of an underlying event—but chose not to make it an exception to Rule 801(d)(1)(C).

The reasons for that choice are apparent from the Advisory Committee's Notes on Rule 801 and its legislative history. The premise for Rule 801(d)(1)(C) was that, given adequate safeguards against suggestiveness, out-of-court identifications were generally preferable to courtroom identifications. Advisory Committee's Notes on Rule 801, 28 U. S. C. App., p. 717. Thus, despite the traditional view that such statements were hearsay, the Advisory Committee believed that their use was to be fostered rather than discouraged. Similarly, the House Report on the Rule noted that since, "[a]s time goes by, a witness' memory will fade and his identification will become less reliable," minimizing the barriers to admission of more contemporaneous identification is fairer to defendants and prevents "cases falling through because the witness can no longer recall the identity of the person he saw commit the crime." H. R. Rep. No. 94–355, p. 3 (1975). See also S. Rep. No. 94–199, p. 2 (1975). To judge from the House and Senate Reports, Rule 801(d)(1)(C) was in part di-

rected to the very problem here at issue: a memory loss that makes it impossible for the witness to provide an in-court identification or testify about details of the events underlying an earlier identification.

Respondent argues that this reading is impermissible because it creates an internal inconsistency in the Rules, since the forgetful witness who is deemed "subject to cross-examination" under 801(d)(1)(C) is simultaneously deemed "unavailable" under 804(a)(3). This is the position espoused by a prominent commentary on the Rules, see 4 J. Weinstein & M. Berger, Weinstein's Evidence 801–120 to 801–121, 801–178 (1987). It seems to us, however, that this is not a substantive inconsistency, but only a semantic oddity resulting from the fact that Rule 804(a) has for convenience of reference in Rule 804(b) chosen to describe the circumstances necessary in order to admit certain categories of hearsay testimony under the rubric "Unavailability as a witness." These circumstances include not only absence from the hearing, but also claims of privilege, refusals to obey a court's order to testify, and inability to testify based on physical or mental illness or memory loss. Had the rubric instead been "unavailability as a witness, memory loss, and other special circumstances" there would be no apparent inconsistency with Rule 801, which is a definition section excluding certain statements entirely from the category of "hearsay." The semantic inconsistency exists not only with respect to Rule 801(d)(1)(C), but also with respect to the other subparagraphs of Rule 801(d)(1). It would seem strange, for example, to assert that a witness can avoid introduction of testimony from a prior proceeding that is inconsistent with his trial testimony, see Rule 801(d)(1)(A), by simply asserting lack of memory of the facts to which the prior testimony related. See *United States* v. *Murphy*, 696 F. 2d 282, 283–284 (CA4 1982), cert. denied, 461 U. S. 945 (1983). But that situation, like this one, presents the verbal curiosity that the witness is "subject to cross-examination" under Rule 801

while at the same time "unavailable" under Rule 804(a)(3). Quite obviously, the two characterizations are made for two entirely different purposes and there is no requirement or expectation that they should coincide.

For the reasons stated, we hold that neither the Confrontation Clause nor Federal Rule of Evidence 802 is violated by admission of an identification statement of a witness who is unable, because of a memory loss, to testify concerning the basis for the identification. The decision of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

So ordered.

JUSTICE KENNEDY took no part in the consideration or decision of this case.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

In an interview during his month-long hospitalization, in what was apparently a singular moment of lucid recollection, John Foster selected respondent James Owens' photograph from an array of possible suspects and informed FBI Agent Thomas Mansfield that it was respondent who had attacked him with a metal pipe on the morning of April 12, 1982. Had Foster subsequently died from his injuries, there is no doubt that both the Sixth Amendment and the Federal Rules of Evidence would have barred Mansfield from repeating Foster's out-of-court identification at trial. Fortunately, Foster survived the beating; his memory, however, did not, and by the time of respondent's trial he could no longer recall his assailant or explain why he had previously identified respondent as such. This profound memory loss, therefore, rendered Foster no less a conduit for stale and inscrutable evidence than Mansfield would have been, yet the Court nevertheless concludes that because defense counsel was afforded an unrestricted opportunity to cross-examine him,

Foster's unadorned reiteration of his earlier statement did not deprive respondent of his constitutional right to confront the witness against him. In my view, the Court today reduces the right of confrontation to a purely procedural protection, and a markedly hollow one at that. Because I believe the Sixth Amendment guarantees criminal defendants the right to engage in cross-examination sufficient to "affor[d] the trier of fact a satisfactory basis for evaluating the truth of [a] prior statement," *California* v. *Green*, 399 U. S. 149, 161 (1970), and because respondent clearly was not afforded such an opportunity here, I dissent.

I

On April 12, 1982, Foster was brutally assaulted while on duty as a correctional counselor at the federal prison in Lompoc, California. His attacker beat him repeatedly about the head and upper body with a metal pipe, inflicting numerous and permanently disabling injuries, one of which was a profound loss of short-term memory. Foster spent nearly a month in the hospital recuperating from his injuries, much of that time in a state of semiconsciousness. Although numerous people visited him, including his wife who visited daily, Foster remembered none except Agent Mansfield. While he had no recollection of Mansfield's first visit on April 19, he testified that his memory of the interview Mansfield conducted on May 5 was "vivid." App. 28. In particular, he recalled telling Mansfield: "[A]fter I was hit I looked down and saw the blood on the floor, and jammed my finger into Owens' chest, and said, 'That's enough of that,' and hit my alarm button." *Id.*, at 31.

Foster testified that at the time he made these statements, he was certain that his memory was accurate. In addition, he recalled choosing respondent's photograph from those Mansfield showed him. There is no dispute, however, that by the time of trial Foster could no longer remember who had assaulted him or even whether he had seen his attacker.

Nor could he recall whether any of the prison officials or other persons who visited him in the hospital had ever suggested that respondent had beaten him. A medical expert who testified on behalf of the prosecution explained that Foster's inability to remember most of the details of the assault was attributable to a gradual and selective memory loss caused by his head injuries.

II

The principal witness against respondent was not the John Foster who took the stand in December 1983—that witness could recall virtually nothing of the events of April 12, 1982, and candidly admitted that he had no idea whether respondent had assaulted him. Instead, respondent's sole accuser was the John Foster who, on May 5, 1982, identified respondent as his attacker. This John Foster, however, did not testify at respondent's trial: the profound memory loss he suffered during the approximately 18 months following his identification prevented him from affirming, explaining, or elaborating upon his out-of-court statement just as surely and completely as his assertion of a testimonial privilege, or his death, would have. Thus, while the Court asserts that defense counsel had "realistic weapons" with which to impugn Foster's prior statement, *ante*, at 560, it does not and cannot claim that cross-examination could have elicited any information that would have enabled a jury to evaluate the trustworthiness or reliability of the identification. Indeed, although the Court suggests that defense counsel was able to explore Foster's "lack of care and attentiveness," his "bad memory," and the possibility that hospital visitors suggested respondent's name to him, *ante*, at 559, 560, Foster's memory loss precluded any such inquiries: he simply could not recall whether he had actually seen his assailant or even whether he had had an opportunity to see him, nor could he remember any of his visitors, let alone whether any of them had suggested that respondent had attacked him. Moreover, by the

time of trial, Foster was unable to shed any light on the accuracy of his May 1982 recollection of the assault; the most he could state was that on the day of the interview he felt certain that his statements were true. As the court below found, "[c]learly, two of the three dangers surrounding Foster's out-of-court identifications—misperception and failure of memory—could not be mitigated in any way by the only cross-examination of Foster that was available to [respondent]." 789 F. 2d 750, 759 (CA9 1986).

In short, neither Foster nor the prosecution could demonstrate the basis for Foster's prior identification. Nevertheless, the Court concludes that the Sixth Amendment presents no obstacle to the introduction of such an unsubstantiated out-of-court statement, at least not where the declarant testifies under oath at trial and is subjected to unrestricted cross-examination. According to the Court, the Confrontation Clause is simply a procedural trial right that "guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Ante*, at 559 (citations omitted; internal quotation marks omitted; emphasis in original).

Although the Court suggests that the result it reaches today follows naturally from our earlier cases, we have never before held that the Confrontation Clause protects nothing more than a defendant's right to question live witnesses, no matter how futile that questioning might be. On the contrary, as the Court's own recitation of our prior case law reveals, we have repeatedly affirmed that the right of confrontation ensures "an opportunity for *effective* cross-examination." *Delaware* v. *Fensterer*, 474 U. S. 15, 20 (1985) *(per curiam)* (emphasis added); see also *Nelson* v. *O'Neil*, 402 U. S. 622, 629 (1971) (Confrontation Clause does not bar admission of out-of-court statement where defendant has "the benefit of full and *effective* cross-examination of [declarant]") (emphasis added); *California* v. *Green*, 399 U. S.,

at 159 (introduction of out-of-court statement does not violate Confrontation Clause "as long as the defendant is assured of full and *effective* cross-examination at the time of trial") (emphasis added). While we have rejected the notion that effectiveness should be measured in terms of a defendant's ultimate success, we have never, until today, equated effectiveness with the mere opportunity to pose questions. Rather, consistent with the Confrontation Clause's mission of "advanc[ing] a practical concern for the accuracy of the truth-determining process in criminal trials," *Dutton* v. *Evans*, 400 U. S. 74, 89 (1970), we have suggested that the touchstone of effectiveness is whether the cross-examination affords "'the trier of fact . . . a satisfactory basis for evaluating the truth of the prior statement.'" *Ibid.* (quoting *California* v. *Green*, *supra*, at 161). See also *Ohio* v. *Roberts*, 448 U. S. 56, 73 (1980) (introduction of prior testimony where the declarant was unavailable at trial did not violate Confrontation Clause where previous cross-examination of declarant "afforded the trier of fact a satisfactory basis for evaluating the truth of the prior statement" (citation omitted; internal quotation marks omitted));[1] *Mancusi* v. *Stubbs*, 408 U. S. 204, 216 (1972)

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[1] In *Ohio* v. *Roberts*, the Court indicated that, for purposes of determining the constitutional admissibility of prior testimony where the declarant is unavailable at trial, it is unnecessary to consider whether defense counsel's questioning at the prior hearing "surmount[ed] some inevitably nebulous threshold of 'effectiveness,'" and held that "in all but . . . extraordinary cases, no inquiry into 'effectiveness' is required." 448 U. S., at 73 n. 12. In so ruling, however, the Court did not dispense with the Sixth Amendment's substantive minima of effectiveness, but rather rejected the claim that prior testimony should be deemed inherently unreliable where the declarant was cross-examined by an attorney whose performance is subsequently deemed ineffective in collateral habeas corpus proceedings. In this context, therefore, "effectiveness" obviously refers to the *attorney's* performance, not the impediments to meaningful cross-examination created by a *witness'* memory loss. Indeed, the footnote in question is appended to a sentence once again affirming the need for affording the factfinder an adequate basis for assessing the truth of prior statements, and the author of *Roberts* has twice since confirmed that the Sixth Amend-

(same). Where no opportunity for such cross-examination exists, we have recognized that the Sixth Amendment permits the introduction of out-of-court statements only when they bear sufficient independent "indicia of reliability." *Dutton* v. *Evans*, *supra*, at 89.

In dispensing with these substantive constitutional requirements today, the Court relies almost exclusively on our decision in *Delaware* v. *Fensterer*, *supra*, a case that did not involve the introduction of prior statements. *Fensterer* concerned an expert witness' inability to remember which of three possible scientific theories he had used in formulating his opinion. Although Fensterer contended that the witness' forgetfulness made it impossible to impeach the scientific validity of his conclusions, we noted that "an expert who cannot recall the basis for his opinion invites the jury to find that his opinion is as reliable as his memory." *Id.*, at 19. While the witness' endorsement of a given scientific theory might have maximized the effectiveness of cross-examination, the Confrontation Clause guarantees only that level of effectiveness necessary to afford the factfinder a satisfactory basis for assessing the validity of the evidence offered. Thus, because the expert's inability to remember the basis for his opinion was self-impeaching, the constitutional guarantee had clearly been satisfied.

Fensterer, therefore, worked no change in our Confrontation Clause jurisprudence, yet the Court purports to discern in it a principle under which all live testimony as to a witness' past belief is constitutionally admissible, provided the de-

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ment guarantees an opportunity for meaningful cross-examination. See *Kentucky* v. *Stincer*, 482 U. S. 730, 739, n. 9 (1987) (BLACKMUN, J.) (a state rule precluding access to certain information before trial "may hinder [the] defendant's opportunity for *effective* cross-examination at trial, and thus . . . may violate the Confrontation Clause") (emphasis in original); *Pennsylvania* v. *Ritchie*, 480 U. S. 39, 63, n. 1 (1987) (BLACKMUN, J., concurring) (*Fensterer* "[did] not imply that concern about . . . effectiveness [of cross-examination] has no place in analysis under the Confrontation Clause").

fendant is afforded an opportunity to question the witness. From this the Court derives the corollary that prior statements as to past belief are equally admissible, again given the requisite opportunity for questioning the declarant at trial. Accordingly, the Court asserts, the Confrontation Clause draws no line "between a forgetful witness' live testimony that he once believed this defendant to be the perpetrator of the crime, and the introduction of the witness' earlier statement to that effect." *Ante*, at 560. The obvious shortcoming in this reasoning, of course, is that *Fensterer* announced no such blanket rule: while the expert's memory lapse in that case was self-impeaching, it does not follow—and we have therefore never held—that all forgetfulness may be so characterized. Certainly in the present case, Foster's inability in December 1983 to remember the events of April 1982 in no way impugned or otherwise cast doubt upon the accuracy or trustworthiness of his memory in May 1982, particularly in light of the uncontradicted medical testimony explaining that his forgetfulness was the result of the head injuries he sustained. Under our prior cases, then, the constitutional admissibility of Foster's prior statement, and the testimony of the Court's hypothetical witness who cannot recall the basis for his past belief, should depend on whether the memory loss so seriously impedes cross-examination that the factfinder lacks an adequate basis upon which to assess the truth of the proffered evidence. Whatever may be said of the Court's hypothetical, it is clear in the case before us that Foster's near total loss of memory precluded any meaningful examination or assessment of his out-of-court statement and thus should have barred the admission of that statement.

To the extent the Court's ruling is motivated by the fear that a contrary result will open the door to countless Confrontation Clause challenges to the admission of out-of-court statements, that fear is groundless. To begin with, cases such as the present one will be rare indeed. More typically, witnesses asserting a memory loss will either not suffer (or

claim) a total inability to recollect, or will do so under circumstances that suggest bias or ulterior motive; in either case, given the threshold of "effectiveness" established by our prior decisions, the witness' partial memory or self-interest in claiming a complete memory loss will afford the factfinder an adequate basis upon which to evaluate the reliability and trustworthiness of the out-of-court statement. Even in those relatively few cases where no such basis can be elicited, the prior statement is still admissible if it bears independent "indicia of reliability." Finally, assessments of "effectiveness" for Confrontation Clause purposes are no different than those undertaken by courts in deciding common evidentiary questions, and thus should not prove unduly burdensome.[2] In any event, to the extent such assessments prove inconvenient or troublesome, those burdens flow from our commitment to a Constitution that places a greater value on individual liberty than on efficient judicial administration.

III

I agree with the Court that the Confrontation Clause does not guarantee defendants the right to confront only those witnesses whose testimony is not marred by forgetfulness,

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[2] Indeed, in a case such as this one, the inquiry into the constitutional adequacy of defendant's opportunity for cross-examination is identical to that required under Federal Rule of Evidence 804(a)(3), which deems a declarant "unavailable" if, at trial, he or she "testifies to a lack of memory of the *subject matter* of the declarant's [prior] statement" (emphasis added). The Court today, of course, concludes that notwithstanding Rule 804(a)'s definition of unavailability, a prior identification is not hearsay under Rule 801(d)(1)(C), and is therefore admissible, as long as the declarant is subject to cross-examination concerning the statement itself, regardless of whether the declarant can recall the basis for that statement. See *ante*, at 561–564. Because I believe such a construction of Rule 801(d)(1)(C) renders it unconstitutional under the Confrontation Clause, I would require, consistent with Rule 804(a), that the declarant be subject to cross-examination as to the subject matter of the prior statement. See 4 J. Weinstein & M. Berger, Weinstein's Evidence 801–120 to 801–121 (1987) (endorsing such a construction of Rule 801(d)(1)(C)).

confusion, or evasion, and that the right of confrontation "'is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination.'" *Ante*, at 558 (quoting *Fensterer*, 474 U. S., at 22). But as we stressed just last Term, this right to cross-examination "is essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial." *Kentucky* v. *Stincer*, 482 U. S. 730, 737 (1987). In the present case, respondent Owens was afforded no opportunity to probe and expose the infirmities of Foster's May 5, 1982, recollections, for here cross-examination, the "greatest legal engine ever invented for the discovery of truth," *California* v. *Green*, 399 U. S., at 158, stood as helpless as current medical technology before Foster's profound memory loss. In concluding that respondent's Sixth Amendment rights were satisfied by Foster's mere presence in the courtroom, the Court reduces the right of confrontation to a hollow formalism. Because I believe the Confrontation Clause guarantees more than the right to ask questions of a live witness, no matter how dead that witness' memory proves to be, I dissent.

REPORTER'S NOTE

The next page is purposely numbered 801. The numbers between 572 and 801 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR OCTOBER 5, 1987, THROUGH FEBRUARY 22, 1988

OCTOBER 5, 1987

Appeals Dismissed

No. 86–1242. CITY OF AKRON ET AL. *v.* OHIO MANUFACTURERS' ASSN. ET AL. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 801 F. 2d 824.

No. 86–1656. UTAH POWER & LIGHT CO. *v.* IDAHO PUBLIC UTILITIES COMMISSION ET AL. Appeal from Sup. Ct. Idaho dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 112 Idaho 10, 730 P. 2d 930.

No. 86–1850. ANDERSON *v.* FROHNMAYER ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 812 F. 2d 714.

No. 86–1885. SCARVACI *v.* MATESTIC, ASSISTANT DISTRICT ATTORNEY, ET AL. Appeal from C. A. 7th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86–1891. HALLIWELL *v.* EU, SECRETARY OF STATE OF CALIFORNIA, ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86–1899. POLYAK *v.* STACK ET AL. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 812 F. 2d 1408.

No. 86–2008. BRANSON *v.* COMMISSIONER OF INTERNAL REVENUE. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a

petition for writ of certiorari, certiorari denied. Reported below: 815 F. 2d 82.

No. 86–2039. OKIN *v.* COMMISSIONER OF INTERNAL REVENUE. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 808 F. 2d 1338.

No. 86–2041. CASSIDY ET AL. *v.* FIRESTONE TIRE & RUBBER CO. ET AL. Appeal from Dist. Ct. App. Fla., 1st Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 495 So. 2d 801.

No. 86–2059. SHERIFF OF FALL RIVER COUNTY JAIL ET AL. *v.* HUGHES. Appeal from C. A. 8th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 814 F. 2d 532.

No. 86–6977. JIMENEZ *v.* MUNICIPAL COURT, SAN MATEO COUNTY. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86–7142. COATS *v.* WOODS ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 819 F. 2d 236.

No. 86–7149. PRENZLER *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86–7153. PRENZLER *v.* SOCIAL SECURITY ADMINISTRATION. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 87–229. KING *v.* CALIFORNIA ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 784 F. 2d 910.

No. 87–315. TICKEL *v.* GEORGIA. Appeal from Ct. App. Ga. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 181 Ga. App. XXIX.

No. 87–342. HUDGINS ET AL. *v.* INTERNAL REVENUE SERVICE. Appeal from C. A. D. C. Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 257 U. S. App. D. C. 242, 808 F. 2d 137.

No. 87–5045. WULFFENSTEIN *v.* UTAH. Appeal from Sup. Ct. Utah dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 733 P. 2d 120.

No. 87–5062. WILLIAMS *v.* GEORGIA. Appeal from Ct. App. Ga. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 181 Ga. App. 902, 354 S. E. 2d 184.

No. 87–5168. BROWN *v.* PARNHAM. Appeal from C. A. 11th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 816 F. 2d 686.

No. 87–5188. COOMBS *v.* METROPOLITAN FEDERAL SAVINGS & LOAN ASSNS. Appeal from Sup. Ct. N. J. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 87–5208. WILLIAMS *v.* FEDERICO ET AL. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 509 So. 2d 1119.

No. 87–5273. NAKAGAWA *v.* COLORADO. Appeal from Ct. App. Colo. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 86–1758. WATERWAYS ASSOCIATION OF PITTSBURGH *v.* ROSE, STATE TAX COMMISSIONER OF WEST VIRGINIA. Appeal from Cir. Ct. Kanawha County, W. Va., dismissed for want of properly presented federal question.

No. 86-6886. MELNICK *v.* CITY OF MENTOR. Appeal from Ct. App. Ohio, Lake County, dismissed for want of properly presented federal question.

No. 86-7023. W. L. H. *v.* K. B. M. ET AL. Appeal from Sup. Ct. Pa. dismissed for want of properly presented federal question. Reported below: 514 Pa. 636, 522 A. 2d 1105.

No. 86-1840. CLAYPOOL ET AL. *v.* CLAYPOOL. Appeal from Sup. Ct. S. C. Motion of appellee for leave to proceed *in forma pauperis* granted. Appeal dismissed for want of jurisdiction.

No. 86-1875. DEWEESE NELSON REALTY, INC. *v.* EQUITY SERVICES CO. ET AL. Appeal from Sup. Ct. Miss. dismissed for want of substantial federal question. Reported below: 502 So. 2d 310.

No. 86-1985. FREED ET UX. *v.* WORCESTER COUNTY DEPARTMENT OF SOCIAL SERVICES ET AL. Appeal from Ct. Sp. App. Md. dismissed for want of substantial federal question. Reported below: 69 Md. App. 447, 518 A. 2d 159.

No. 86-2061. CITIZENS FOR BETTER EDUCATION ET AL. *v.* GOOSE CREEK CONSOLIDATED INDEPENDENT SCHOOL DISTRICT ET AL. Appeal from Ct. App. Tex., 1st Dist., dismissed for want of substantial federal question. Reported below: 719 S. W. 2d 350.

No. 86-7010. CLAY *v.* CLAY ET AL. Appeal from Ct. App. Minn. dismissed for want of substantial federal question. Reported below: 397 N. W. 2d 571.

No. 87-14. CHASE *v.* SCHLEUNING. Appeal from Ct. App. Ore. dismissed for want of substantial federal question. Reported below: 83 Ore. App. 149, 729 P. 2d 14.

No. 87-23. LONG *v.* HARRISON, A MINOR, BY AND THROUGH HIS NEXT FRIENDS AND NATURAL PARENTS, HARRISON, ET AL. Appeal from Sup. Ct. Kan. dismissed for want of substantial federal question. Reported below: 241 Kan. 174, 734 P. 2d 1155.

No. 87-45. LUND ET UX. *v.* COUNTY OF HENNEPIN. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. Reported below: 403 N. W. 2d 617.

No. 87-51. HANSEN *v.* CITY OF SAN BUENAVENTURA, CALIFORNIA. Appeal from Sup. Ct. Cal. dismissed for want of sub-

stantial federal question. Reported below: 42 Cal. 3d 1172, 729 P. 2d 186.

No. 87–86. WILDERMUTH *v.* PENNSYLVANIA. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 514 Pa. 374, 524 A. 2d 490.

No. 87–126. ARCHDIOCESAN SCHOOL OFFICE ET AL. *v.* COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES. Appeal from Sup. Ct. Conn. dismissed for want of substantial federal question. Reported below: 202 Conn. 601, 522 A. 2d 781.

No. 87–141. POE, JUDGE OF THE 228TH JUDICIAL DISTRICT COURT OF HARRIS COUNTY, TEXAS *v.* COLLIER. Appeal from Ct. Crim. App. Tex. dismissed for want of substantial federal question. Reported below: 732 S. W. 2d 332.

No. 87–156. BURNS ET AL. *v.* CHISUM INDEPENDENT SCHOOL DISTRICT ET AL. Appeal from Ct. App. Tex., 6th Dist., dismissed for want of substantial federal question. Reported below: 720 S. W. 2d 836.

No. 87–158. BEREZOSKI *v.* OHIO. Appeal from Ct. App. Ohio, Montgomery County, dismissed for want of substantial federal question.

No. 87–237. RHINEHART ET AL. *v.* TRIBUNE PUBLISHING CO., INC., ET AL. Appeal from Ct. App. Wash. dismissed for want of substantial federal question. Reported below: 44 Wash. App. 707, 723 P. 2d 22.

No. 86–1915. BOHEMIAN CLUB *v.* FAIR EMPLOYMENT AND HOUSING COMMISSION ET AL. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 187 Cal. App. 3d 1, 231 Cal. Rptr. 769.

No. 86–2040. KAVANAGH *v.* COVEN. Appeal from App. Div., Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of jurisdiction. Reported below: 128 App. Div. 2d 450, 512 N. Y. S. 2d 776.

No. 87–15. BROWN ET AL. *v.* BAILEY ET AL. Appeal from Ct. Civ. App. Ala. dismissed for want of substantial federal ques-

tion. JUSTICE WHITE would dismiss the appeal for want of jurisdiction. Reported below: 504 So. 2d 289.

Vacated and Remanded After Certiorari Granted

No. 86–1217. RUSSONIELLO ET AL. *v.* OLAGUES ET AL. C. A. 9th Cir. [Certiorari granted, 481 U. S. 1012.] Judgment vacated and case remanded to the Court of Appeals with instructions that the United States District Court for the Northern District of California dismiss the action as moot. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950).

No. 86–1419. OREGON DEPARTMENT OF HUMAN RESOURCES ET AL. *v.* COOS BAY CARE CENTER ET AL. C. A. 9th Cir. [Certiorari granted, 481 U. S. 1036.] Judgment vacated and case remanded to the Court of Appeals to consider the suggestion of mootness.

Certiorari Granted—Vacated and Remanded

No. 86–1714. ARN, SUPERINTENDENT, OHIO REFORMATORY FOR WOMEN *v.* GREEN. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals to consider the question of mootness. Reported below: 809 F. 2d 1257.

No. 86–1851. HAPANIEWSKI *v.* CITY OF CHICAGO HEIGHTS. App. Ct. Ill., 1st Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Goodman* v. *Lukens Steel Co.*, 482 U. S. 656 (1987). Reported below: 147 Ill. App. 3d 528, 497 N. E. 2d 97.

No. 86–1855. DELTA AIR LINES, INC., ET AL. *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AIRLINE DIVISION, ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals to consider the question of mootness. JUSTICE STEVENS took no part in the consideration or decision of this case. Reported below: 813 F. 2d 1359.

No. 86–1898. ILLINOIS *v.* DUNCAN. Sup. Ct. Ill. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Richardson* v. *Marsh*, 481 U. S. 200 (1987). Reported below: 115 Ill. 2d 429, 505 N. E. 2d 307.

No. 86–1906. HOLZER *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McNally* v. *United States*, 483 U. S. 350 (1987). Reported below: 816 F. 2d 304.

No. 86–6641. GRAY *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position presently asserted by the Solicitor General in his brief filed June 17, 1987. Reported below: 809 F. 2d 579.

No. 87–8. BURROUGHS ET AL. *v.* HIGGINS. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *O'Lone* v. *Estate of Shabazz*, 482 U. S. 342 (1987). Reported below: 816 F. 2d 119.

No. 87–24. MOORE ET AL. *v.* BECHTEL POWER CORP. ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *West* v. *Conrail*, 481 U. S. 35 (1987). Reported below: 810 F. 2d 205.

No. 87–28. PICKETT ET AL. *v.* CHAPMAN. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Anderson* v. *Creighton*, 483 U. S. 635 (1987). Reported below: 801 F. 2d 912.

No. 87–161. COPELAND *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Fla. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987). Reported below: 505 So. 2d 425.

Certiorari Dismissed

No. 86–7029. LEWIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari dismissed. *Warden* v. *Palermo*, 431 U. S. 911 (1977). Reported below: 812 F. 2d 715.

Miscellaneous Orders

No. – – ——. FARNUM *v.* COMMISSIONER OF PATENTS AND TRADEMARKS; and

No. – – ——. UHLMANN-KIHEI, INC., ET AL. *v.* GAH, INC. Motions to direct the Clerk to file the petitions for writs of certiorari out of time denied.

No. A–110. CONSTRUCTION, PRODUCTION & MAINTENANCE LABORERS' LOCAL 383 *v.* CARTER-GLOGAU LABORATORIES, INC. Motion for reconsideration of denial of application for extension of time to file a petition for writ of certiorari denied.

No. A–198. CHROMIAK *v.* UNITED STATES. D. C. C. D. Cal. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–217. HERBAGE *v.* MEESE, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. Application for writ of habeas corpus, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. D–647. IN RE DISBARMENT OF ELDEN. It having been reported to the Court that William Elden died September 2, 1987, the rule to show cause, heretofore issued on July 29, 1987 [483 U. S. 1040], is hereby discharged.

No. 94, Orig. SOUTH CAROLINA *v.* BAKER, SECRETARY OF THE TREASURY. Motion of National Governors' Association for leave to file a reply brief granted. Exceptions to the Report of the Special Master are set for oral argument in due course. [For earlier order herein, see, *e. g.*, 479 U. S. 1078.]

No. 109, Orig. OKLAHOMA ET AL. *v.* NEW MEXICO. Motion for leave to file bill of complaint granted, and defendant is allowed 60 days within which to file an answer.

No. 86–279. BASIC INC. ET AL. *v.* LEVINSON ET AL. C. A. 6th Cir. [Certiorari granted, 479 U. S. 1083.] Motion of Joseph Harris et al. for leave to file a brief as *amici curiae* out of time denied. THE CHIEF JUSTICE and JUSTICE SCALIA took no part in the consideration or decision of this motion.

No. 86–684. CALIFORNIA *v.* GREENWOOD ET AL. Ct. App. Cal., 4th App. Dist. [Certiorari granted, 483 U. S. 1019.] Motion of respondent Dyanne Van Houten for divided argument denied. Motion for appointment of counsel granted, and it is ordered that Michael Ian Garey, Esq., of Santa Ana, Cal., be appointed to serve as counsel for respondent Billy Greenwood in this case.

No. 86–803. BOOS ET AL. *v.* BARRY, MAYOR OF THE DISTRICT OF COLUMBIA, ET AL. C. A. D. C. Cir. [Certiorari granted, 479

U. S. 1083.] Motion of Legal Affairs Council et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied.

No. 86-935. REGENTS OF THE UNIVERSITY OF CALIFORNIA *v.* PUBLIC EMPLOYMENT RELATIONS BOARD ET AL. Ct. App. Cal., 1st App. Dist. [Probable jurisdiction noted, 483 U. S. 1004.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 86-958. NORWEST BANK WORTHINGTON ET AL. *v.* AHLERS ET UX. C. A. 8th Cir. [Certiorari granted, 483 U. S. 1004.] Motion of respondents for leave to proceed further herein *in forma pauperis* granted. Motion of petitioners to dispense with printing the joint appendix granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 86-978. GARDEBRING, COMMISSIONER OF THE MINNESOTA DEPARTMENT OF HUMAN SERVICES *v.* JENKINS. C. A. 8th Cir. [Certiorari granted, 482 U. S. 926.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 86-1172. GOODYEAR ATOMIC CORP. *v.* MILLER ET AL. Sup. Ct. Ohio. [Probable jurisdiction noted, 483 U. S. 1004.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 86-1387. MACKEY ET AL. *v.* LANIER COLLECTION AGENCY & SERVICE, INC. Sup. Ct. Ga. [Certiorari granted, 483 U. S. 1004.] Maureen E. Mahoney, Esq., of Washington, D. C., a member of the Bar of this Court, is invited to brief and argue this case as *amicus curiae* in support of the judgment below. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 86-1431. LOEFFLER *v.* TISCH, POSTMASTER GENERAL OF THE UNITED STATES. C. A. 8th Cir. [Certiorari granted, 483 U. S. 1004.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 86-1590. NOVINGER ET UX. *v.* KRAMER ET AL., 481 U. S. 1069. Motion of respondent Swartz for damages denied. Motion of respondents Kramer and Geffen for damages denied.

No. 86-1856. NORTHWEST CENTRAL PIPELINE CORP. *v.* STATE CORPORATION COMMISSION OF KANSAS ET AL. Appeal from Sup. Ct. Kan.;

No. 86-1857. CONTINENTAL BANK INTERNATIONAL *v.* CITY OF NEW YORK, DEPARTMENT OF FINANCE. Appeal from Ct. App. N. Y.;

No. 86-1940. SHEET METAL WORKERS' INTERNATIONAL ASSN. ET AL. *v.* LYNN. C. A. 9th Cir.;

No. 87-42. CLIFT *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) ET AL. C. A. 7th Cir.; and

No. 87-133. BUCHANAN *v.* STANSHIPS, INC., ET AL. C. A. 5th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 86-2035. CHESAPEAKE & OHIO RAILWAY CO. *v.* ALDRIDGE ET AL. C. A. 4th Cir. Motion of Association of American Railroads et al. for leave to file a brief as *amici curiae* granted.

No. 86-6284. SATTERWHITE *v.* TEXAS. Ct. Crim. App. Tex. [Certiorari granted, 482 U. S. 905.] Motion for appointment of counsel granted, and it is ordered that Richard D. Woods, Esq., of San Antonio, Tex., be appointed to serve as counsel for petitioner in this case.

No. 86-6757. COY *v.* IOWA. Sup. Ct. Iowa. [Probable jurisdiction noted, 483 U. S. 1019.] Motion of appellant to seal the record granted. Motion for appointment of counsel granted, and it is ordered that Paul J. Papak, Esq., of Iowa City, Iowa, be appointed to serve as counsel for appellant in this case.

No. 86-6964. IN RE CONCOBY. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until October 26, 1987, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of madamus

without reaching the merits of the motion to proceed *in forma pauperis*.

No. 86–7009. IN RE SHIBUYA;
No. 86–7012. IN RE SHIBUYA; and
No. 87–5032. IN RE SHIBUYA. Motions of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until October 26, 1987, within which to pay the docketing fee required by Rule 45(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petitions for writs of mandamus without reaching the merits of the motions to proceed *in forma pauperis*.

No. 86–7147. MACLIN *v.* MOBILE CONSORTIUM ET AL. C. A. 11th Cir.;
No. 87–5085. BROWN *v.* CITY OF ST. LOUIS ET AL. C. A. 8th Cir.; and
No. 87–5137. MCCULLUM *v.* MICHIGAN. Ct. App. Mich. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until October 26, 1987, within which to pay the docketing fee required by Rule 45(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petitions for writs of certiorari without reaching the merits of the motions to proceed *in forma pauperis*.

No. 87–113. HERCEG ET AL. *v.* HUSTLER MAGAZINE, INC. C. A. 5th Cir. Motion of Charles H. Keating, Jr., for leave to file a brief as *amicus curiae* granted.

No. 87–159. OHIO CASUALTY INSURANCE CO. *v.* DOWNEY SAVINGS & LOAN ASSN. Ct. App. Cal., 2d App. Dist. Motions of California Bankers Association and Washington Legal Foundation for leave to file briefs as *amici curiae* granted.

No. 87–5153. CARNEGIE *v.* UNITED STATES. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until October 26, 1987, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 87–5008. IN RE MCDONALD. Sup. Ct. Tenn.; and

No. 87–5124. IN RE TAYLOR. Ct. App. La., 3d Cir. Petitions for writs of common-law certiorari denied. Reported below: No. 87–5124, 495 So. 2d 996.

No. 86–7052. IN RE MCDONALD. Sup. Ct. Tenn. Petition for writ of common-law certiorari and habeas corpus denied.

No. 86–6996. IN RE CLARK;

No. 86–7086. IN RE MCDONALD; and

No. 87–5115. IN RE OLIVER. Petitions for writs of habeas corpus denied.

No. 86–7053. IN RE MONTGOMERY;

No. 86–7098. IN RE MCGOVERN;

No. 86–7120. IN RE BROWN-EL;

No. 87–5004. IN RE TYLER;

No. 87–5037. IN RE FAZZINI;

No. 87–5157. IN RE WOOL; and

No. 87–5183. IN RE D'AMARIO. Petitions for writs of mandamus denied.

No. 86–1910. IN RE HUDGINS ET AL.; and

No. 87–5155. IN RE NABORS. Petitions for writs of mandamus and/or prohibition denied.

No. 87–5125. IN RE TAYLOR. Petition for writ of prohibition denied.

Probable Jurisdiction Noted or Postponed

No. 86–1836. NEW YORK STATE CLUB ASSN., INC. *v.* CITY OF NEW YORK ET AL. Appeal from Ct. App. N. Y. Probable juris-

diction noted. Reported below: 69 N. Y. 2d 211, 505 N. E. 2d 915.

No. 86–1961. TULSA PROFESSIONAL COLLECTION SERVICES, INC. *v.* POPE, EXECUTRIX OF THE ESTATE OF POPE. Appeal from Sup. Ct. Okla. Probable jurisdiction noted. Reported below: 733 P. 2d 396.

No. 86–1743. MONESSEN SOUTHWESTERN RAILWAY CO. *v.* MORGAN. Appeal from Sup. Ct. Pa. Motion of Association of American Railroads for leave to file a brief as *amicus curiae* granted. Probable jurisdiction noted. Reported below: 513 Pa. 86, 518 A. 2d 1171.

No. 86–7113. KADRMAS ET AL. *v.* DICKINSON PUBLIC SCHOOLS ET AL. Appeal from Sup. Ct. N. D. Motion of appellants for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 402 N. W. 2d 897.

No. 87–5002. MCCOY *v.* COURT OF APPEALS OF WISCONSIN, DISTRICT 1. Appeal from Sup. Ct. Wis. Motion of appellant for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 137 Wis. 2d 90, 403 N. W. 2d 449.

No. 86–1970. MISSISSIPPI POWER & LIGHT CO. *v.* MISSISSIPPI EX REL. PITTMAN, ATTORNEY GENERAL OF MISSISSIPPI, ET AL. Appeal from Sup. Ct. Miss. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 506 So. 2d 978.

Certiorari Granted

No. 86–1520. BROCK, SECRETARY OF LABOR *v.* RICHLAND SHOE CO. C. A. 3d Cir. Certiorari granted. Reported below: 799 F. 2d 80.

No. 86–1715. FEDERAL LABOR RELATIONS AUTHORITY *v.* ABERDEEN PROVING GROUND, DEPARTMENT OF THE ARMY. C. A. 4th Cir. Certiorari granted.

No. 86–1753. DOE *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. Reported below: 812 F. 2d 1404.

No. 86–1764. BETHESDA HOSPITAL ASSN. ET AL. *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari granted. Reported below: 810 F. 2d 558.

No. 86–1781. SCHWEIKER ET AL. *v.* CHILICKY ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 796 F. 2d 1131.

No. 87–3. BRASWELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. Reported below: 814 F. 2d 190.

No. 87–16. SHAPERO *v.* KENTUCKY BAR ASSN. Sup. Ct. Ky. Certiorari granted. Reported below: 726 S. W. 2d 299.

No. 87–65. UNITED STATES *v.* PROVIDENCE JOURNAL CO. ET AL. C. A. 1st Cir. Certiorari granted. Reported below: 820 F. 2d 1342 and 1354.

No. 87–107. PATTERSON *v.* McLEAN CREDIT UNION. C. A. 4th Cir. Certiorari granted. Reported below: 805 F. 2d 1143.

No. 87–157. ALLIED TUBE & CONDUIT CORP. *v.* INDIAN HEAD, INC. C. A. 2d Cir. Certiorari granted. Reported below: 817 F. 2d 938.

No. 86–1145. PATRICK *v.* BURGET ET AL. C. A. 9th Cir. Certiorari granted. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 800 F. 2d 1498.

No. 86–1406. PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS ET AL. *v.* ISLA PETROLEUM CORP. ET AL. Temp. Emerg. Ct. App. Certiorari granted. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 811 F. 2d 1511.

No. 86–1685. FLORIDA ET AL. *v.* LONG ET AL. C. A. 11th Cir. Motion of Equal Employment Advisory Counsel et al. for leave to file a brief as *amici curiae* granted. Certiorari granted limited to Questions 1, 2(A), 2(B), and 2(C) presented by the petition. Reported below: 805 F. 2d 1542.

No. 86–1992. IMMIGRATION AND NATURALIZATION SERVICE *v.* PANGILINAN ET AL.; and

No. 86–2019. IMMIGRATION AND NATURALIZATION SERVICE *v.* MANZANO. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: No. 86–1992, 796 F. 2d 1091.

No. 87–4. WHEAT *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 813 F. 2d 1399.

Certiorari Denied. (See also Nos. 86–1242, 86–1656, 86–1850, 86–1885, 86–1891, 86–1899, 86–2008, 86–2039, 86–2041, 86–2059, 86–6977, 86–7142, 86–7149, 86–7153, 87–229, 87–315, 87–342, 87–5045, 87–5062, 87–5168, 87–5188, 87–5208, 87–5273, 87–5008, 87–5124, and 86–7052, *supra*.)

No. 86–1102. MANUFACTURERS ASSOCIATION OF TRI-COUNTY ET AL. *v.* KNEPPER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 801 F. 2d 130.

No. 86–1382. SAJER, ADJUTANT GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, ET AL. *v.* JORDEN. C. A. 3d Cir. Certiorari denied. Reported below: 799 F. 2d 99.

No. 86–1570. MCKINLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 808 F. 2d 60.

No. 86–1607. BAILEY *v.* RYAN STEVEDORING CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 808 F. 2d 55.

No. 86–1608. BULJUBASIC *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 808 F. 2d 1260.

No. 86–1613. NATIONAL TREASURY EMPLOYEES UNION *v.* HORNER, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 805 F. 2d 384.

No. 86–1614. GRAHAM, AS EXECUTRIX OF THE ESTATE OF GRAHAM *v.* TELEDYNE-CONTINENTAL MOTORS, A DIVISION OF TELEDYNE INDUSTRIES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 805 F. 2d 1386.

No. 86–1619. LOCAL UNION NO. 690, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* CARUSO. Sup. Ct. Wash. Certiorari denied. Reported below: 107 Wash. 2d 524, 730 P. 2d 1299.

No. 86–1623. LOCAL 19, UNITED GLASS & CERAMIC WORKERS *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 799 F. 2d 1152.

No. 86–1625. GORMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 807 F. 2d 1299.

No. 86–1626. HASKINS *v.* UNITED STATES DEPARTMENT OF THE ARMY. C. A. 6th Cir. Certiorari denied. Reported below: 808 F. 2d 1192.

No. 86–1633. NORWICH EATON PHARMACEUTICALS, INC. *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 808 F. 2d 486.

No. 86–1642. MONONGAHELA POWER CO. ET AL. *v.* MARSH, SECRETARY OF THE ARMY, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 257 U. S. App. D. C. 345, 809 F. 2d 41.

No. 86–1643. MISSISSIPPI *v.* FLOYD. Sup. Ct. Miss. Certiorari denied. Reported below: 500 So. 2d 989.

No. 86–1646. TEXAS *v.* WILLIAMS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 738 S. W. 2d 257.

No. 86–1647. GOLDIN, COMPTROLLER OF THE CITY OF NEW YORK, ET AL. *v.* BAKER, SECRETARY OF THE TREASURY. C. A. 2d Cir. Certiorari denied. Reported below: 809 F. 2d 187.

No. 86–1665. HURT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 795 F. 2d 765 and 808 F. 2d 707.

No. 86–1673. GREGORY *v.* DRURY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 809 F. 2d 249.

No. 86–1674. HESTERMAN, EXECUTRIX OF THE ESTATE OF HESTERMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 772 F. 2d 914.

No. 86–1678. MORRIS *v.* GARMON. Sup. Ct. Ark. Certiorari denied. Reported below: 291 Ark. 67, 722 S. W. 2d 571.

No. 86–1709. CHANDLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 800 F. 2d 1140.

No. 86–1710. KNAPP *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 86–1717. JENKINS ET AL. *v.* MISSOURI ET AL.; and

No. 86–1718. KANSAS CITY, MISSOURI, SCHOOL DISTRICT ET AL. *v.* MISSOURI ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 807 F. 2d 657.

No. 86–1720. TREVINO ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 804 F. 2d 1512.

No. 86–1729. CALIFORNIA STATE LANDS COMMISSION *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 805 F. 2d 857.

No. 86–1735. SHOE WORLD, INC., DBA GUSSINI *v.* EL GRECO LEATHER PRODUCTS CO., INC., DBA CANDIE'S INTERNATIONAL. C. A. 2d Cir. Certiorari denied. Reported below: 806 F. 2d 392.

No. 86–1739. GUARINI ET AL. *v.* NEW YORK ET AL. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 215 N. J. Super. 293, 521 A. 2d 1294.

No. 86–1741. T. J. MELTON III & ASSOCIATES, INC., ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 5th Cir. Certiorari denied. Reported below: 808 F. 2d 1521.

No. 86–1744. SHORTER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 257 U. S. App. D. C. 358, 809 F. 2d 54.

No. 86–1746. DARNELL ET AL. *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION; POLLEY ET AL. *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION; ALEXANDER *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION; MCCORMACK *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION; and SWAUGER *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 807 F. 2d 943 (first case); 809 F. 2d 787 (second case); 809 F. 2d 787 (third case); 809 F. 2d 787 (fourth case); 809 F. 2d 787 (fifth case).

No. 86–1747. MEYER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 802 F. 2d 348.

No. 86–1750. SOUTHERN METHODIST UNIVERSITY *v.* KNEELAND ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 806 F. 2d 1285.

No. 86–1751. RHODES *v.* DEKALB COUNTY, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 806 F. 2d 1068.

No. 86–1760. CARPENTERS LOCAL 608, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 811 F. 2d 149.

No. 86–1772. UNITED PACIFIC INSURANCE CO. *v.* LAUREL COUNTY ET AL.; and

No. 86–1922. LAUREL COUNTY ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 805 F. 2d 628.

No. 86–1773. CRONSON, AUDITOR GENERAL OF ILLINOIS *v.* MADDEN, ACTING DIRECTOR, ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS. Sup. Ct. Ill. Certiorari denied. Reported below: 114 Ill. 2d 504, 501 N. E. 2d 1267.

No. 86–1782. BLACK HILLS POWER & LIGHT CO. ET AL. *v.* WEINBERGER, SECRETARY OF DEFENSE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 808 F. 2d 665.

No. 86–1783. COLAHAN, DBA IBA OF OHIO, ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 811 F. 2d 287.

No. 86–1784. COHL ET AL. *v.* UNITED STATES; and
No. 86–1785. COHL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 812 F. 2d 1408.

No. 86–1788. TELEGRAPH SAVINGS & LOAN ASSN. ET AL. *v.* FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 807 F. 2d 590.

No. 86–1791. WARD *v.* SENTRY TITLE CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 806 F. 2d 1278.

No. 86–1793. BONNER *v.* FORD, DEPUTY SHERIFF OF DALE COUNTY, ALABAMA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 813 F. 2d 409.

No. 86–1794. MBANK CORPUS CHRISTI, N. A. *v.* DAVILA ET AL. Ct. App. Tex., 13th Dist. Certiorari denied. Reported below: 750 S. W. 2d 1.

No. 86–1804. TRAVIS ET AL. *v.* TEXAS ET AL. Sup. Ct. Tex. Certiorari denied. Reported below: 722 S. W. 2d 698.

No. 86–1805. OLSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 86–1806. R. D. RYNO INDUSTRIES, INC., DBA R. D. RYNO MAZDA *v.* MAZDA DISTRIBUTORS (GULF), INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 807 F. 2d 1222.

No. 86-1807. LEOGRANDE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 811 F. 2d 147.

No. 86-1810. DUNGEY *v.* USX CORP. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 148 Ill. App. 3d 484, 499 N. E. 2d 545.

No. 86-1812. HRIBAR *v.* TRW, INC. C. A. 6th Cir. Certiorari denied. Reported below: 815 F. 2d 78.

No. 86-1816. YOUNG *v.* REAGAN, PRESIDENT OF THE UNITED STATES, ET AL. C. A. 10th Cir. Certiorari denied.

No. 86-1817. KONDRAT *v.* O'NEILL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 815 F. 2d 78.

No. 86-1822. THOMPSON *v.* MONSANTO CORP. C. A. 5th Cir. Certiorari denied. Reported below: 809 F. 2d 1167.

No. 86-1825. BRAWER *v.* OPTIONS CLEARING CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 807 F. 2d 297.

No. 86-1829. ATLANTIC RICHFIELD CO. *v.* INDEPENDENT U. S. TANKER OWNERS COMMITTEE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 258 U. S. App. D. C. 6, 809 F. 2d 847.

No. 86-1830. SPECK *v.* MCQUIDDY PRINTING CO., INC. C. A. 6th Cir. Certiorari denied. Reported below: 815 F. 2d 80.

No. 86-1833. WATTS *v.* GENERAL TELEPHONE COMPANY OF THE SOUTHEAST. C. A. 11th Cir. Certiorari denied. Reported below: 808 F. 2d 60.

No. 86-1834. BROWN *v.* ALABAMA DEPARTMENT OF PENSIONS AND SECURITY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 808 F. 2d 1522.

No. 86-1837. BAUMANN-FURRIE & CO. *v.* COMMODITY CREDIT CORPORATION, UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 815 F. 2d 712.

No. 86-1838. PALERMO *v.* REX ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 806 F. 2d 1266.

No. 86-1839. BERRY ESTATES, INC. *v.* REGAN, COMPTROLLER OF THE STATE OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 812 F. 2d 67.

No. 86–1841. SUNSHINE BISCUITS, INC. *v.* APPONI ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 809 F. 2d 1210.

No. 86–1842. ARNAIZ *v.* UNITED STATES;
No. 86–1998. BACALLAO ET AL. *v.* UNITED STATES;
No. 86–6591. MOYA *v.* UNITED STATES; and
No. 86–6637. RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 810 F. 2d 206.

No. 86–1846. HOWARD *v.* CHESAPEAKE & OHIO RAILWAY CO. C. A. 6th Cir. Certiorari denied. Reported below: 812 F. 2d 282.

No. 86–1849. WOMACK ET AL. *v.* GETTELFINGER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 808 F. 2d 446.

No. 86–1852. LONG ET AL. *v.* FLORIDA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 805 F. 2d 1542.

No. 86–1853. OHIO DEPARTMENT OF MENTAL HEALTH *v.* MILTON. Sup. Ct. Ohio. Certiorari denied. Reported below: 29 Ohio St. 3d 20, 505 N. E. 2d 255.

No. 86–1858. INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL. *v.* ALLIED INTERNATIONAL, INC. C. A. 1st Cir. Certiorari denied. Reported below: 814 F. 2d 32.

No. 86–1861. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* HYATT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 807 F. 2d 376.

No. 86–1862. JOHN HANSON SAVINGS & LOAN, INC. *v.* MARYLAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 812 F. 2d 1401.

No. 86–1863. FINANCIAL INFORMATION, INC. *v.* MOODY'S INVESTORS SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 808 F. 2d 204.

No. 86–1864. COLAN *v.* CUTLER-HAMMER, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 812 F. 2d 357.

No. 86–1865. MARQUEZ-PEREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 813 F. 2d 409.

No. 86–1866. ALABAMA *v.* LYNG, SECRETARY OF AGRICULTURE, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 811 F. 2d 567.

No. 86–1867. COOK *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 256 Ga. 808, 353 S. E. 2d 333.

No. 86–1868. PLAINS COTTON COOPERATIVE ASSOCIATION OF LUBBOCK, TEXAS *v.* GOODPASTURE COMPUTER SERVICE, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 807 F. 2d 1256.

No. 86–1869. BEACHBOARD *v.* TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK. C. A. 3d Cir. Certiorari denied. Reported below: 815 F. 2d 693.

No. 86–1872. HARGRAVE *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 724 S. W. 2d 202.

No. 86–1873. JONES, BY AND THROUGH HIS NEXT FRIEND, JONES *v.* UNIVERSITY INTERSCHOLASTIC LEAGUE ET AL. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 715 S. W. 2d 759.

No. 86–1874. PERSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 813 F. 2d 105.

No. 86–1876. PACECO, INC. *v.* SMITH ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 86–1877. FOGERTY ET AL. *v.* CALIFORNIA ET AL.; and
No. 86–1901. TAHOE SHOREZONE REPRESENTATION *v.* CALIFORNIA ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 187 Cal. App. 3d 224, 231 Cal. Rptr. 810.

No. 86–1880. SPRENGER, OLSON & SHUTES, P. A., ET AL. *v.* BURLINGTON NORTHERN RAILROAD CO. C. A. 7th Cir. Certiorari denied. Reported below: 810 F. 2d 601.

No. 86–1882. STOOT *v.* D & D CATERING SERVICE, INC. C. A. 5th Cir. Certiorari denied. Reported below: 807 F. 2d 1197.

No. 86–1884. GORDON *v.* DAVIS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 811 F. 2d 1507.

No. 86–1887. MAYERS ET UX. *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 11th Cir. Certiorari denied. Reported below: 806 F. 2d 995.

No. 86–1888. MARTINELLI, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF MARTINELLI, ET AL. *v.* UNITED STATES DEPARTMENT OF THE ARMY. C. A. 3d Cir. Certiorari denied. Reported below: 812 F. 2d 872.

No. 86–1889. DIAZ-ALBERTINI *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 772 F. 2d 654.

No. 86–1890. GIBBS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 813 F. 2d 596.

No. 86–1892. FORD MOTOR CO. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 814 F. 2d 1099.

No. 86–1893. DOUGLAS *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 24 M. J. 129.

No. 86–1894. BARTON *v.* E. F. HUTTON & CO., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 809 F. 2d 548.

No. 86–1895. RIVAL MANUFACTURING CO. *v.* AVERBACH. C. A. 3d Cir. Certiorari denied. Reported below: 809 F. 2d 1016.

No. 86–1896. BRAME *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 818 F. 2d 876.

No. 86–1900. PELTIER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 800 F. 2d 772.

No. 86–1902. BEN M. HOGAN CO., INC. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 809 F. 2d 480.

No. 86–1903. HOWARD *v.* MARSH, SECRETARY OF THE ARMY. C. A. 8th Cir. Certiorari denied. Reported below: 808 F. 2d 841.

No. 86–1905. BRUMFIELD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 810 F. 2d 196.

No. 86–1909. HOFFMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 812 F. 2d 714.

No. 86–1911. CASA LINDA PRESBYTERIAN CHURCH IN AMERICA ET AL. *v.* GRACE UNION PRESBYTERY, INC., ET AL. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 710 S. W. 2d 700.

No. 86–1912. TOTUS ET AL. *v.* HOLLY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 812 F. 2d 714.

No. 86–1913. LAWRENCE *v.* SECRETARY OF TRANSPORTATION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 257 U. S. App. D. C. 242, 808 F. 2d 137.

No. 86–1914. PERLSTEIN *v.* HERRMANN. C. A. 3d Cir. Certiorari denied. Reported below: 817 F. 2d 752.

No. 86–1917. BARNES-HIND/HYDROCURVE, INC., ET AL. *v.* BAUSCH & LOMB INC. C. A. Fed. Cir. Certiorari denied. Reported below: 796 F. 2d 443.

No. 86–1918. ALIOTO & ALIOTO ET AL. *v.* E. F. HUTTON & CO., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 809 F. 2d 548.

No. 86–1919. CHEROKEE INSURANCE CO. *v.* RIEDER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 813 F. 2d 398.

No. 86–1920. MCDONALD PONTIAC-CADILLAC-GMC, INC. *v.* PROSECUTING ATTORNEY FOR THE COUNTY OF SAGINAW. Ct. App. Mich. Certiorari denied. Reported below: 150 Mich. App. 52, 388 N. W. 2d 301.

No. 86–1921. LIFETIME DOORS, INC. *v.* BARBER & ROSS CO. C. A. 4th Cir. Certiorari denied. Reported below: 810 F. 2d 1276.

No. 86–1923. MADDEN ET AL. *v.* GLUCK ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 815 F. 2d 1163.

No. 86–1924. LAUCHLAN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 86–1925. FLORIDA *v.* JONES. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 497 So. 2d 1268.

No. 86–1926. CHICAGO BRIDGE & IRON CO. *v.* DEPARTMENT OF LABOR AND INDUSTRIES OF WASHINGTON ET AL. Ct. App.

Wash. Certiorari denied. Reported below: 46 Wash. App. 252, 731 P. 2d 1.

No. 86-1929. MCGINNIS *v.* E. F. HUTTON & CO., INC. C. A. 6th Cir. Certiorari denied. Reported below: 812 F. 2d 1011.

No. 86-1930. GRYNBERG *v.* SKALET, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 814 F. 2d 653.

No. 86-1931. GRISWOLD ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 812 F. 2d 712.

No. 86-1932. GATES, CHIEF OF POLICE, LOS ANGELES POLICE DEPARTMENT, ET AL. *v.* LANGFORD ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 43 Cal. 3d 21, 729 P. 2d 822.

No. 86-1933. HELLER *v.* CONSOLIDATED RAIL CORPORATION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 815 F. 2d 694.

No. 86-1934. TEDDER *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 24 M. J. 129.

No. 86-1937. SANGER-HARRIS, A DIVISION OF FEDERATED DEPARTMENT STORES, INC. *v.* RICHARDS, TREASURER OF THE STATE OF TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 812 F. 2d 211.

No. 86-1938. BEASLEY *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 86-1939. HAYES *v.* DIXON ET AL. Ct. App. N. C. Certiorari denied. Reported below: 83 N. C. App. 52, 348 S. E. 2d 609.

No. 86-1941. CARDINAL INDUSTRIES, INC. *v.* KING ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 811 F. 2d 609.

No. 86-1942. JORDAN ET AL. *v.* NORTH MISSISSIPPI RURAL LEGAL SERVICES, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 808 F. 2d 1114.

No. 86-1945. VARIAN ASSOCIATES, INC. *v.* UTLEY. C. A. 9th Cir. Certiorari denied. Reported below: 811 F. 2d 1279.

No. 86–1946. DECINTIO ET AL. *v.* WESTCHESTER COUNTY MEDICAL CENTER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 807 F. 2d 304.

No. 86–1947. QUALITY ALUMINUM PRODUCTS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 813 F. 2d 795.

No. 86–1949. MARTIN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 815 F. 2d 818.

No. 86–1950. ADER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 816 F. 2d 673.

No. 86–1951. COOPER ET AL. *v.* ARIZONA WESTERN COLLEGE DISTRICT GOVERNING BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 812 F. 2d 714.

No. 86–1952. RICATTO ET AL. *v.* BROCK, SECRETARY OF LABOR. C. A. 2d Cir. Certiorari denied. Reported below: 810 F. 2d 1161.

No. 86–1953. HILL *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 24 M. J. 127.

No. 86–1954. MARBLE *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 24 M. J. 127.

No. 86–1955. COX *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 24 M. J. 127.

No. 86–1956. NICELY *v.* UNITED STATES STEEL CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 813 F. 2d 398.

No. 86–1957. MONTGOMERY PUBLISHING CO. *v.* GANT. Sup. Ct. Pa. Certiorari denied. Reported below: 513 Pa. 444, 521 A. 2d 920.

No. 86–1958. MAINE CENTRAL RAILROAD CO. ET AL. *v.* BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES. C. A. 1st Cir. Certiorari denied. Reported below: 813 F. 2d 484.

No. 86–1959. HARDIE *v.* HARDIE. Super. Ct. Alaska, 3d Jud. Dist. Certiorari denied.

No. 86–1960. BROOKS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 115 Ill. 2d 510, 505 N. E. 2d 336.

No. 86–1962. SCHLAEPPI ET AL. *v.* DELAWARE TRUST CO., TRUSTEE. Sup. Ct. Del. Certiorari denied. Reported below: 523 A. 2d 981.

No. 86–1965. SEILER *v.* LUCASFILM, LTD., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 808 F. 2d 1316.

No. 86–1966. MATHIS ET AL. *v.* HYDRO AIR INDUSTRIES, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 818 F. 2d 874.

No. 86–1968. LOS ANGELES RAIDERS *v.* NATIONAL FOOTBALL LEAGUE ET AL.; and

No. 86–1972. NATIONAL FOOTBALL LEAGUE ET AL. *v.* OAKLAND RAIDERS, LTD., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 791 F. 2d 1356.

No. 86–1969. CAMPOS-GUARDADO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 809 F. 2d 285.

No. 86–1973. GOELST *v.* GOELST. Super. Ct. Ga., Cobb County. Certiorari denied.

No. 86–1974. EDDINS *v.* NEW YORK UNIVERSITY. C. A. 2d Cir. Certiorari denied. Reported below: 833 F. 2d 1002.

No. 86–1975. MICHELSON *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. C. A. 10th Cir. Certiorari denied.

No. 86–1976. BRIGGS *v.* INDIANA SUPREME COURT DISCIPLINARY COMMISSION; and

No. 86–1977. BRIGGS *v.* INDIANA SUPREME COURT DISCIPLINARY COMMISSION. Sup. Ct. Ind. Certiorari denied. Reported below: No. 86–1976, 502 N. E. 2d 879; No. 86–1977, 502 N. E. 2d 890.

No. 86–1978. JACKSON COUNTY BY AND THROUGH ITS CHILD SUPPORT ENFORCEMENT AGENCY EX REL. JACKSON *v.* SWAYNEY. Sup. Ct. N. C. Certiorari denied. Reported below: 319 N. C. 52, 352 S. E. 2d 413.

No. 86–1979. TEXAS *v.* WILKERSON. 208th Dist. Ct. of Harris County, Tex. Certiorari denied.

No. 86–1980. BAILEY *v.* GRAND TRUNK LINES NEW ENGLAND ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 805 F. 2d 1097.

No. 86–1983. TEAL *v.* BUCKNER ET UX. Ct. App. Tenn. Certiorari denied.

No. 86–1984. EIDAL INTERNATIONAL CORP. *v.* GARCIA ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 808 F. 2d 717.

No. 86–1988. TORRES *v.* STATE BOARD OF LAW EXAMINERS OF ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 86–1989. DRAINE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 811 F. 2d 1419.

No. 86–1991. CHUCK'S FEED & SEED CO., INC. *v.* RALSTON PURINA CO. C. A. 4th Cir. Certiorari denied. Reported below: 810 F. 2d 1289.

No. 86–1993. HICKS *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 24 M. J. 3.

No. 86–1994. VERDEGAAL BROTHERS, INC., ET AL. *v.* UNION OIL COMPANY OF CALIFORNIA ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 814 F. 2d 628.

No. 86–1995. FONDEL *v.* FORD MOTOR CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 803 F. 2d 719.

No. 86–1996. ILLINOIS *v.* KAIL. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 150 Ill. App. 3d 75, 501 N. E. 2d 979.

No. 86–1997. ROUSSEAU ET AL. *v.* TELEDYNE MOVIBLE OFFSHORE, INC. C. A. 5th Cir. Certiorari denied. Reported below: 805 F. 2d 1245.

No. 86–1999. MURPHY *v.* DANAHER, CHEMUNG COUNTY JUDGE, ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 123 App. Div. 2d 461, 506 N. Y. S. 2d 235.

No. 86–2001. KIRKSEY ET AL. *v.* WASHINGTON. C. A. 11th Cir. Certiorari denied. Reported below: 811 F. 2d 561.

No. 86–2002. CITY OF LONG BEACH ET AL. *v.* AIRCAL INC. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 815 F. 2d 714.

No. 86–2004. HOWITT *v.* UNITED STATES DEPARTMENT OF COMMERCE. C. A. Fed. Cir. Certiorari denied. Reported below: 818 F. 2d 877.

No. 86–2005. CASEY ET AL. *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 86–2006. VOICE OF AMERICANISM ET AL. *v.* KENDALL ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 86–2009. ITEL CONTAINERS INTERNATIONAL CORP. ET AL. *v.* M/V C. C. SAN FRANCISCO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 808 F. 2d 697.

No. 86–2010. DUQUEMIN ET AL. *v.* HORSESHOE BEND PROPERTIES, INC. C. A. 11th Cir. Certiorari denied. Reported below: 814 F. 2d 661.

No. 86–2011. WILSON ET AL. *v.* ARMSTRONG WORLD INDUSTRIES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 810 F. 2d 1358.

No. 86–2012. COLE *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 24 M. J. 18.

No. 86–2014. JOHNSON *v.* HETTLEMAN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 812 F. 2d 1401.

No. 86–2016. MYERS ET AL. *v.* MORRIS ET AL.; and
No. 87–61. LALLAK ET AL. *v.* MORRIS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 810 F. 2d 1437.

No. 86–2017. HOLDING *v.* SOVRAN BANK ET AL. Sup. Ct. Va. Certiorari denied.

No. 86–2020. MACZKO *v.* JOYCE. C. A. 6th Cir. Certiorari denied. Reported below: 814 F. 2d 308.

No. 86–2021. GIL-ZAPATA *v.* UNITED STATES DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 815 F. 2d 716.

No. 86–2022. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 808 F. 2d 654.

No. 86–2023. SHEPARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 808 F. 2d 59.

No. 86–2024. MEYERS ET AL. *v.* CONTRA COSTA COUNTY DEPARTMENT OF SOCIAL SERVICES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 812 F. 2d 1154.

No. 86–2025. KING *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 710 S. W. 2d 110.

No. 86–2026. DEAVER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 86–2027. SOUTHERN FUEL CO. *v.* LANGHAM-HILL PETROLEUM, INC. C. A. 4th Cir. Certiorari denied. Reported below: 813 F. 2d 1327.

No. 86–2028. ILLINOIS STATE BOARD OF EDUCATION *v.* BOARD OF EDUCATION OF THE CITY OF PEORIA, SCHOOL DISTRICT NO. 150. C. A. 7th Cir. Certiorari denied. Reported below: 810 F. 2d 707.

No. 86–2031. BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ALABAMA, ET AL. *v.* FOSTER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 810 F. 2d 1021.

No. 86–2032. DETOMASO *v.* PAN AMERICAN WORLD AIRWAYS, INC. Sup. Ct. Cal. Certiorari denied. Reported below: 43 Cal. 3d 517, 733 P. 2d 614.

No. 86–2033. MOLINARI *v.* MCNEIL PHARMACEUTICAL. C. A. 3d Cir. Certiorari denied. Reported below: 810 F. 2d 1164.

No. 86–2034. MCGOVREN *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 86–2036. MALATESTA *v.* COURT OF APPEALS OF THE STATE OF NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 124 App. Div. 2d 62, 511 N. Y. S. 2d 246.

No. 86–2038. SNYDER *v.* PENNSYLVANIA JUDICIAL INQUIRY AND REVIEW BOARD. Sup. Ct. Pa. Certiorari denied. Reported below: 514 Pa. 142, 523 A. 2d 294.

No. 86–2043. NEW YORK TELEPHONE CO. ET AL. *v.* CAHILL ET AL.; and

No. 86–2044. PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK ET AL. *v.* CAHILL ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 69 N. Y. 2d 265, 506 N. E. 2d 187.

No. 86–2046. HOWARD *v.* ARIZONA DEPARTMENT OF REVENUE. Ct. App. Ariz. Certiorari denied.

No. 86–2047. JOHNSON ET AL. *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 291 Ark. 260, 724 S. W. 2d 160.

No. 86–2048. THOMPSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 814 F. 2d 1472.

No. 86–2049. BAYER *v.* JOHNSON, SECRETARY OF REVENUE OF SOUTH DAKOTA. Sup. Ct. S. D. Certiorari denied. Reported below: 400 N. W. 2d 884.

No. 86–2050. JOHNSON ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 815 F. 2d 713.

No. 86–2051. JOYNER *v.* LANCASTER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 815 F. 2d 20.

No. 86–2054. BOSTON & MAINE CORP. ET AL. *v.* RAILWAY LABOR EXECUTIVES' ASSN. C. A. 1st Cir. Certiorari denied. Reported below: 808 F. 2d 150.

No. 86–2055. CARROLL *v.* CITY OF HUNTSVILLE. Ct. Crim. App. Ala. Certiorari denied. Reported below: 505 So. 2d 389.

No. 86–2056. MOSLEY *v.* SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 811 F. 2d 609.

No. 86–2058. CHRIST THE KING REGIONAL HIGH SCHOOL *v.* CULVERT, CHAIRMAN, NEW YORK STATE LABOR RELATIONS BOARD, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 815 F. 2d 219.

No. 86–2060. REY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 811 F. 2d 1453.

No. 86–2062. SANDERS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 812 F. 2d 715.

No. 86–2063. MAHR ET UX. *v.* NATIONAL BROADCASTING CO., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 813 F. 2d 1230.

No. 86–2065. BROOKS *v.* EBONY OIL CORP. C. A. 2d Cir. Certiorari denied. Reported below: 819 F. 2d 1129.

No. 86–2066. YASUI ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 86–2067. SCHWARTZ *v.* CITY OF GRAND PRAIRIE, TEXAS, ET AL. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 86–2069. JUDGE ET AL. *v.* CITY OF FORT LAUDERDALE. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 502 So. 2d 433.

No. 86–2071. VERDERBER *v.* CANTELLO PLUMBING CORP. C. A. 3d Cir. Certiorari denied. Reported below: 817 F. 2d 753.

No. 86–6501. WHITLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 809 F. 2d 786.

No. 86–6509. CHAVEZ *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied.

No. 86–6566. GARAUX *v.* VASQUEZ, WARDEN. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 86–6593. HALL *v.* JONES ET AL. Ct. App. Ga. Certiorari denied. Reported below: 180 Ga. App. 454, 349 S. E. 2d 469.

No. 86–6619. SAMPLE *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 806 F. 2d 258.

No. 86–6647. VUE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 811 F. 2d 1509.

No. 86–6655. ISREAL *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 86–6661. WALSH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 811 F. 2d 608.

No. 86–6679. MOORE *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 86–6683. POLLARD *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 149 Ill. App. 3d 434, 500 N. E. 2d 971.

No. 86-6699. BOGGINS *v.* UNITED STATES PAROLE COMMISSION. C. A. 3d Cir. Certiorari denied. Reported below: 813 F. 2d 396.

No. 86-6703. HILTON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 291 S. C. 276, 353 S. E. 2d 282.

No. 86-6705. BALL *v.* WHITE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 812 F. 2d 1413.

No. 86-6707. RAINES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 812 F. 2d 1402.

No. 86-6709. CHAGRA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 807 F. 2d 398.

No. 86-6716. NEELY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 256 U. S. App. D. C. 295, 804 F. 2d 1324.

No. 86-6719. RUBALCABA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 811 F. 2d 491.

No. 86-6735. CALLANAN ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 810 F. 2d 544.

No. 86-6737. BRADLEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 812 F. 2d 774.

No. 86-6745. MILLS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 810 F. 2d 907.

No. 86-6755. BROOKS *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 147 Ill. App. 3d 1160, 512 N. E. 2d 138.

No. 86-6766. KNIGHT *v.* JAGO, SUPERINTENDENT, LONDON CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied. Reported below: 812 F. 2d 1407.

No. 86-6770. MOSES *v.* PARWATIKAR. C. A. 8th Cir. Certiorari denied. Reported below: 813 F. 2d 891.

No. 86-6782. MCCABE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 812 F. 2d 1060.

No. 86-6784. RIOS *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 733 P. 2d 242.

No. 86-6793. PRIEST *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 240 Kan. xli, 761 P. 2d 1253.

No. 86-6794. LIFFITON *v.* TOWN OF AMHERST ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 810 F. 2d 1160.

No. 86-6800. DENBY *v.* SITTON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 808 F. 2d 55.

No. 86-6808. CANNON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 807 F. 2d 1528.

No. 86-6812. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 805 F. 2d 1038.

No. 86-6813. SABLOSKY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 810 F. 2d 167.

No. 86-6828. FILAR *v.* GIELOW, CHAIRMAN, RAILROAD RETIREMENT BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 810 F. 2d 1167.

No. 86-6839. WILLIAMS *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 720 S. W. 2d 236.

No. 86-6841. GORDON *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 803 F. 2d 1071.

No. 86-6846. CLEVELAND *v.* WARDEN, MARYLAND HOUSE OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 803 F. 2d 1180.

No. 86-6847. HAWKINS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 811 F. 2d 210.

No. 86-6854. CARTER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 812 F. 2d 713.

No. 86-6858. JOHNSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 86-6859. SOTO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 779 F. 2d 558 and 793 F. 2d 217.

No. 86-6863. ROCHON *v.* ACADIA PARISH SHERIFF DEPARTMENT ET AL. C. A. 5th Cir. Certiorari denied.

No. 86-6864. CRANE *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 726 S. W. 2d 302.

No. 86-6879. KENNEDY *v.* BEYER, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 86-6881. SCOTT *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 86-6889. BANKS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 124 App. Div. 2d 1064, 508 N. Y. S. 2d 962.

No. 86-6890. DAWSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 790 F. 2d 1565.

No. 86-6891. MITCHELL *v.* HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 86-6897. STRADER *v.* JOHNSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 808 F. 2d 836.

No. 86-6899. CROCKETT *v.* UNITED STATES; and
No. 86-6901. CREWS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 813 F. 2d 1310.

No. 86-6905. FAWOLE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 815 F. 2d 716.

No. 86-6906. CROSBY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 808 F. 2d 1518.

No. 86-6907. BRUMBAUGH *v.* BRUMBAUGH. Sup. Ct. Fla. Certiorari denied. Reported below: 506 So. 2d 1040.

No. 86-6908. ANDERSON *v.* SOUTH CAROLINA EMPLOYMENT COMMISSION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 811 F. 2d 1504.

No. 86-6909. IRWIN *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied.

No. 86-6910. COLEMAN *v.* ACME MARKETS, INC. C. A. 3d Cir. Certiorari denied. Reported below: 817 F. 2d 751.

No. 86–6911. COLEMAN *v.* TOWNSHIP OF GEORGETOWN, DELAWARE. C. A. 3d Cir. Certiorari denied. Reported below: 817 F. 2d 751.

No. 86–6912. COLEMAN *v.* SUSSEX COUNTY, DELAWARE. C. A. 3d Cir. Certiorari denied. Reported below: 817 F. 2d 751.

No. 86–6913. COLEMAN *v.* UNITED STATES DEPARTMENT OF THE TREASURY. C. A. 3d Cir. Certiorari denied. Reported below: 817 F. 2d 751.

No. 86–6915. REIF *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 812 F. 2d 1410.

No. 86–6920. BOUDREAUX *v.* UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA ET AL. C. A. 5th Cir. Certiorari denied.

No. 86–6922. COMSIA *v.* MANGNONE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 815 F. 2d 76.

No. 86–6924. BECKER *v.* ILLINOIS REAL ESTATE ADMINISTRATION AND DISCIPLINARY BOARD ET AL. C. A. 7th Cir. Certiorari denied.

No. 86–6929. GARDNER *v.* SODERMAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 817 F. 2d 756.

No. 86–6930. GOFF ET AL. *v.* NIX, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 803 F. 2d 358.

No. 86–6931. MORGAN *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 86–6932. HICKS *v.* MUNCY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 815 F. 2d 74.

No. 86–6934. WILLIAMS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 69 Md. App. 805.

No. 86–6935. BUTLER *v.* COLLINS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 816 F. 2d 686.

No. 86–6936. SARADETCH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 815 F. 2d 715.

No. 86-6938. DUTTON *v.* MAYNARD, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 812 F. 2d 593.

No. 86-6942. GOREE *v.* CUNNINGHAM. C. A. 6th Cir. Certiorari denied. Reported below: 816 F. 2d 679.

No. 86-6946. KIDD ET AL. *v.* CITY OF ENNIS, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 813 F. 2d 405.

No. 86-6947. HENSON *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 103 Nev. 806.

No. 86-6948. CABAL *v.* ENVIRODYNE ENGINEERS, INC. C. A. 8th Cir. Certiorari denied. Reported below: 815 F. 2d 710.

No. 86-6949. CARVER *v.* JACK ECKERD CORP. C. A. 11th Cir. Certiorari denied.

No. 86-6950. MMOE *v.* CROTHERS ET AL. Sup. Jud. Ct. Mass. Certiorari denied.

No. 86-6951. LYONS *v.* SCOTT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 808 F. 2d 1521.

No. 86-6952. BEAMER *v.* MUNCY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 815 F. 2d 74.

No. 86-6956. MARTIN *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. Sup. Ct. Ohio. Certiorari denied.

No. 86-6957. SUEING *v.* COURT OF APPEALS OF MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 86-6958. YOUNG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 806 F. 2d 805.

No. 86-6959. MCLINDON *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 86-6963. KELLY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 808 F. 2d 57.

No. 86-6965. BURRELL *v.* DAVIS, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 86-6966. AKIODE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 812 F. 2d 1402.

No. 86-6967. CRUZ *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 428 Mich. 881.

No. 86-6968. PUGHSLEY *v.* O'LEARY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 86-6970. ORTLOFF *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 818 F. 2d 863.

No. 86-6971. TURNER *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 86-6973. COOK *v.* WALLACE ET AL. C. A. 11th Cir. Certiorari denied.

No. 86-6974. COOK *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 814 F. 2d 1109.

No. 86-6975. MACK *v.* AMERICAN TELEPHONE & TELEGRAPH CO., LONG LINES, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 808 F. 2d 59.

No. 86-6976. GLICK *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 815 F. 2d 712.

No. 86-6979. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 813 F. 2d 1353.

No. 86-6981. FRIPP *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 819 F. 2d 1129.

No. 86-6982. HADDIX *v.* CITY OF DAYTON. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 86-6986. BUTLER *v.* BREEDING ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 822 F. 2d 1092.

No. 86-6988. MCMURRY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 818 F. 2d 24.

No. 86-6990. HENDERSON *v.* CARLSON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 812 F. 2d 874.

No. 86-6991. LINN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 811 F. 2d 1509.

No. 86-6992. YOUNG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 814 F. 2d 392.

No. 86-6993. DELESPINE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 86-6994. GRAY EAGLE ET AL. *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 813 F. 2d 400.

No. 86-6995. MANGONE *v.* PENKOWER, JUDGE, COURT OF COMMON PLEAS OF ALLEGHENY COUNTY. C. A. 3d Cir. Certiorari denied.

No. 86-6997. MCDANIEL *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 20 Ark. App. 201, 726 S. W. 2d 688.

No. 86-6998. SIMMONS *v.* BROWN, HORRY COUNTY SHERIFF, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 816 F. 2d 673.

No. 86-6999. ROSE *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 725 S. W. 2d 588.

No. 86-7000. LISTERMAN *v.* UNITED STATES DEPARTMENT OF JUSTICE. C. A. Fed. Cir. Certiorari denied. Reported below: 818 F. 2d 877.

No. 86-7003. SHEARS *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 136 Wis. 2d 562, 407 N. W. 2d 559.

No. 86-7004. TURNPAUGH *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 811 F. 2d 608.

No. 86-7006. MARTIN *v.* MYERS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 817 F. 2d 752.

No. 86-7007. MILLARD *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 810 F. 2d 1403.

No. 86-7008. SINGFIELD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 813 F. 2d 409.

No. 86-7014. TAYLOR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 800 F. 2d 1012.

No. 86–7016. REITER *v.* CROSIER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 814 F. 2d 656.

No. 86–7017. COLEMAN *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 524 A. 2d 679.

No. 86–7018. COLEMAN *v.* CARVEL GARDENS APARTMENTS. Sup. Ct. Del. Certiorari denied. Reported below: 525 A. 2d 582.

No. 86–7019. TRICKER *v.* CUPP, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 812 F. 2d 1411.

No. 86–7020. BROWN *v.* DYKE ET AL. C. A. 3d Cir. Certiorari denied.

No. 86–7021. BLADE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 811 F. 2d 461.

No. 86–7024. KNUCKLES *v.* OHIO. C. A. 6th Cir. Certiorari denied. Reported below: 816 F. 2d 680.

No. 86–7026. HOWLETT *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 86–7027. CHANSON *v.* BUTLER, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 816 F. 2d 676.

No. 86–7028. LONG *v.* COUNTY OF PULASKI, MISSOURI, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 822 F. 2d 1093.

No. 86–7030. WAYNE *v.* TRICKEY, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL INSTITUTION. C. A. 8th Cir. Certiorari denied. Reported below: 815 F. 2d 712.

No. 86–7031. STONE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 813 F. 2d 1536.

No. 86–7033. PRATT *v.* THORNBURGH, GOVERNOR OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 807 F. 2d 355.

No. 86–7034. REIDT *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied.

No. 86–7035. OCHOA *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 86–7036. WHITCOMB *v.* MINNESOTA. Ct. App. Minn. Certiorari denied. Reported below: 399 N. W. 2d 124.

No. 86–7037. SCHUBERT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 800 F. 2d 1141.

No. 86–7038. MITCHELL *v.* CREECY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 813 F. 2d 1228.

No. 86–7039. PLAIN *v.* CITY OF BATON ROUGE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 813 F. 2d 405.

No. 86–7041. BALTSAVIAS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 69 N. Y. 2d 683, 504 N. E. 2d 393.

No. 86–7042. LEGRAND *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 86–7043. SEALS ET AL. *v.* PITTMAN ET AL. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 499 So. 2d 114.

No. 86–7044. STICKLES *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 818 F. 2d 877.

No. 86–7047. HAYWOOD *v.* MASSEY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 822 F. 2d 1093.

No. 86–7049. LAY *v.* KIDWELL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 815 F. 2d 74.

No. 86–7050. DIXON *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 499 N. E. 2d 1187.

No. 86–7051. BECKER *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 816 F. 2d 669.

No. 86–7055. CHESTNUT *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 148 Ill. App. 3d 1159, 513 N. E. 2d 168.

No. 86–7056. SHAKUR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 817 F. 2d 189.

No. 86–7057. PRENZLER *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied.

No. 86–7058. WITHERSPOON *v.* W. R. GRACE & CO. C. A. 4th Cir. Certiorari denied. Reported below: 818 F. 2d 862.

No. 86–7062. STEVENS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 816 F. 2d 683.

No. 86–7063. MERRIAN *v.* TATE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE. C. A. 6th Cir. Certiorari denied. Reported below: 816 F. 2d 681.

No. 86–7064. STEPHENS *v.* SULLIVAN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 86–7067. POTEE *v.* SAMBERG, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 813 F. 2d 1228.

No. 86–7068. REED *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 817 F. 2d 759.

No. 86–7069. MOSELY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 810 F. 2d 93.

No. 86–7070. SABOL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 814 F. 2d 654.

No. 86–7072. BARBARA *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 816 F. 2d 669.

No. 86–7073. ELLINGTON *v.* COOMBE, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 86–7076. GIALTO *v.* REAGAN, PRESIDENT OF THE UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 814 F. 2d 653.

No. 86–7079. EDWARDS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 818 F. 2d 24.

No. 86–7080. BURTON *v.* PALMER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 815 F. 2d 702.

No. 86–7081. CALDWELL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 86–7083. BIGLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 810 F. 2d 1317.

No. 86–7084. REICH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 816 F. 2d 683.

No. 86–7087. SERVER *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 148 Ill. App. 3d 888, 499 N. E. 2d 1019.

No. 86–7088. ROBINSON *v.* WHITE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 86–7089. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 815 F. 2d 74.

No. 86–7090. HILL *v.* IWECO, INC. C. A. 5th Cir. Certiorari denied. Reported below: 800 F. 2d 1143.

No. 86–7091. BARRON *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 107 N. J. 129, 526 A. 2d 195.

No. 86–7092. BROWN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 86–7093. WABEKE *v.* MUTUAL HOME FEDERAL SAVINGS & LOAN ASSN. ET AL. Ct. App. Mich. Certiorari denied.

No. 86–7095. MARROW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 815 F. 2d 1493.

No. 86–7096. THOMAS *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 812 F. 2d 225.

No. 86–7097. NOWAK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 817 F. 2d 757.

No. 86–7099. STRADER *v.* ROGERS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 805 F. 2d 393.

No. 86–7101. BARTKUS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 816 F. 2d 255.

No. 86–7102. ABDUS-SAMMAD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 820 F. 2d 1220.

No. 86–7104. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 817 F. 2d 760.

No. 86–7105. BURTON *v.* LAMBERT ET AL. C. A. 8th Cir. Certiorari denied.

No. 86–7107. HULSEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 812 F. 2d 714.

No. 86–7108. DANDAR *v.* DWYER ET AL. C. A. 3d Cir. Certiorari denied.

No. 86–7110. LIETZKE *v.* WALKER. Sup. Ct. Ala. Certiorari denied. Reported below: 514 So. 2d 346.

No. 86–7111. JULIAN *v.* KOEHLER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 815 F. 2d 78.

No. 86–7116. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 818 F. 2d 863.

No. 86–7117. GANT *v.* ILLINOIS ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 114 Ill. 2d 549, 508 N. E. 2d 731.

No. 86–7118. GRAY *v.* WHITE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 86–7119. LATSHAW *v.* MCA, INC. C. A. 3d Cir. Certiorari denied. Reported below: 813 F. 2d 397.

No. 86–7122. COLLIER *v.* REPUBLICAN NATIONAL COMMITTEE ET AL. Ct. App. D. C. Certiorari denied.

No. 86–7123. NEJAD *v.* FARRIS. C. A. D. C. Cir. Certiorari denied.

No. 86–7124. GANDIA *v.* HOKE, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 819 F. 2d 1129.

No. 86–7125. DANDAR *v.* SPAEDER, EXECUTOR OF THE ESTATE OF READ. Sup. Ct. Pa. Certiorari denied.

No. 86–7127. LEBRON-GONZALEZ ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 816 F. 2d 823.

No. 86–7128. PERRI *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied. Reported below: 817 F. 2d 448.

No. 86–7130. PAUL *v.* IOWA. Dist. Ct. Iowa, Marshall County. Certiorari denied.

No. 86–7133. WRIGHT *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 86–7134. RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 810 F. 2d 1338.

No. 86–7135. MILLER *v.* HENMAN, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 804 F. 2d 421.

No. 86–7136. THOMPSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 817 F. 2d 107.

No. 86–7137. MCELROY-EL *v.* DAVIS, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 86–7138. SPIGELSKI *v.* PITTSBURGH HUMAN RELATIONS COMMISSION. C. A. 3d Cir. Certiorari denied. Reported below: 817 F. 2d 752.

No. 86–7139. STRINGER *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 86–7140. LONG *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied. Reported below: 189 Cal. App. 3d 77, 234 Cal. Rptr. 271.

No. 86–7144. CASTRO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 813 F. 2d 571.

No. 86–7145. GRIFFIN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 818 F. 2d 97.

No. 86–7146. CONLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 817 F. 2d 759.

No. 86–7148. SALMASIAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 819 F. 2d 1130.

No. 86–7150. LAWSON *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 815 F. 2d 704.

No. 86–7152. KILLINGSWORTH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 86–7155. WALKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 812 F. 2d 716.

No. 86–7156. SZILI ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 808 F. 2d 1522.

No. 86–7157. MCGOVERN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 818 F. 2d 872.

No. 86–7158. HINES *v.* JOHNSON, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 86–7159. HICKSON *v.* MCDONALD, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS. C. A. 5th Cir. Certiorari denied.

No. 86–7161. CHAUSSARD *v.* FULCOMER, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 816 F. 2d 925.

No. 86–7163. REED *v.* DOUGLAS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 86–7165. WALKER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 87–1. HANSEN BROTHERS ENTERPRISES *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: 259 U. S. App. D. C. 49, 812 F. 2d 1443.

No. 87–2. VAHLSING *v.* BANGOR & AROOSTOOK RAILROAD CO. ET AL. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 522 A. 2d 912.

No. 87–5. SASSE *v.* CUNNINGHAM ET AL. Ct. App. N. C. Certiorari denied. Reported below: 83 N. C. App. 343, 350 S. E. 2d 178.

No. 87–9. MCDONNELL DOUGLAS CORP. *v.* WORKERS' COMPENSATION APPEALS BOARD OF CALIFORNIA ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 87–11. MOR-FLO INDUSTRIES, INC., ET AL. *v.* STATE INDUSTRIES, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 818 F. 2d 875.

No. 87–12. EASTERN CONNECTICUT HEALTH SERVICES, INC., DBA NEW LONDON CONVALESCENT HOME *v.* NATIONAL LABOR

RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 815 F. 2d 517.

No. 87–13. CHARLTON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 87–17. COWAN ET AL. *v.* MYERS, ACTING DIRECTOR, CALIFORNIA DEPARTMENT OF HEALTH SERVICES, ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 187 Cal. App. 3d 968, 232 Cal. Rptr. 299.

No. 87–18. CAHOKIA MARINE SERVICE, INC., ET AL. *v.* AMERICAN BARGE & TOWING CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 815 F. 2d 711.

No. 87–20. KASHANI *v.* PURDUE UNIVERSITY ET AL.; and
No. 87–68. PURDUE UNIVERSITY ET AL. *v.* KASHANI. C. A. 7th Cir. Certiorari denied. Reported below: 813 F. 2d 843.

No. 87–21. MORGAN ET AL. *v.* ST. JOSEPH TERMINAL RAILROAD CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 815 F. 2d 1232.

No. 87–22. OSBORNE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 813 F. 2d 105.

No. 87–25. NORTHERN IMPROVEMENT CO. ET AL. *v.* UNITED STATES; and
No. 87–60. MCCORMICK *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 814 F. 2d 540.

No. 87–26. STUBBS *v.* UNITED STATES (two cases). Ct. Mil. App. Certiorari denied. Reported below: 23 M. J. 188 (first case); 24 M. J. 222 (second case).

No. 87–27. THIER *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 354 Pa. Super. 7, 510 A. 2d 1251.

No. 87–30. SISSON *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 814 F. 2d 634.

No. 87–33. WIEDEMANN & FRANSEN, A. P. L. C. *v.* HOLLYWOOD MARINE, INC. C. A. 5th Cir. Certiorari denied. Reported below: 811 F. 2d 864.

No. 87–35. PALMER *v.* CITY OF SEATTLE. Ct. App. Wash. Certiorari denied.

No. 87–36. INVESTMENT COMPANY INSTITUTE ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 259 U. S. App. D. C. 339, 815 F. 2d 1540.

No. 87–37. EADES *v.* STERLINSKE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 810 F. 2d 723.

No. 87–38. GRANADA ELECTRONICS, INC. *v.* ORIGINAL APPALACHIAN ARTWORKS, INC. C. A. 2d Cir. Certiorari denied. Reported below: 816 F. 2d 68.

No. 87–39. GREGORY, SHERIFF OF PATRICK COUNTY, VIRGINIA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 818 F. 2d 1114.

No. 87–41. BELAK ET AL. *v.* UNITED STATES STEEL CORPORATION PLAN FOR EMPLOYEE PENSION BENEFITS. C. A. 3d Cir. Certiorari denied. Reported below: 815 F. 2d 697.

No. 87–43. CONNERS *v.* CULINARY WORKERS UNION, LOCAL 226. C. A. 9th Cir. Certiorari denied. Reported below: 813 F. 2d 408.

No. 87–44. TULANE HOTEL INVESTORS LIMITED PARTNERSHIP *v.* FIRST FINANCIAL BANK, FSB, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 820 F. 2d 1221.

No. 87–46. FONDO *v.* SHEINDLIN, INDIVIDUALLY AND AS JUDGE OF THE FAMILY COURT OF THE STATE OF NEW YORK, BRONX COUNTY, ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 87–47. COURTRIGHT *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 87–48. A. W., A MINOR, BY AND THROUGH HIS FATHER AND NEXT FRIEND, N. W., ET AL. *v.* NORTHWEST R–1 SCHOOL DISTRICT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 813 F. 2d 158.

No. 87–49. ALASKA AIRLINES, INC., ET AL. *v.* BROCK, SECRETARY OF LABOR, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 258 U. S. App. D. C. 89, 809 F. 2d 930.

No. 87–50. ROE I ET AL. *v.* ABORTION ABOLITION SOCIETY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 811 F. 2d 931.

No. 87–52. MERRELL *v.* THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 807 F. 2d 776.

No. 87–53. KRILETICH *v.* COMMISSION ON JUDICIAL PERFORMANCE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 815 F. 2d 82.

No. 87–54. MARTIN, AKA MARCUS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 815 F. 2d 74.

No. 87–55. TRANSCOAST NAVIGATION, LTD., ET AL. *v.* AMERADA HESS CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 816 F. 2d 671.

No. 87–58. COVINGTON *v.* SOUTHERN ILLINOIS UNIVERSITY. C. A. 7th Cir. Certiorari denied. Reported below: 816 F. 2d 317.

No. 87–63. NORTHEASTERN PHARMACEUTICAL & CHEMICAL CO. ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 810 F. 2d 726.

No. 87–64. NEHER *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 726 S. W. 2d 362.

No. 87–66. BERKMAN *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 812 F. 2d 52.

No. 87–67. JAMES, SUPERINTENDENT, WOMEN'S CORRECTIONAL INSTITUTION AT HARDWICK, GEORGIA *v.* WISECUP. C. A. 11th Cir. Certiorari denied. Reported below: 815 F. 2d 716.

No. 87–71. JACOWAY *v.* ANDERSON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 816 F. 2d 1222.

No. 87–72. RUTLEDGE *v.* RUTLEDGE. Ct. App. Tex., 2d Dist. Certiorari denied. Reported below: 709 S. W. 2d 389, 711 S. W. 2d 437, and 720 S. W. 2d 633.

No. 87–73. NICHOLS ET AL. *v.* RYSAVY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 809 F. 2d 1317.

No. 87–74. BRYAN MEMORIAL HOSPITAL *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 814 F. 2d 1259.

No. 87–77. HEATH *v.* CAST ET AL.; and MCKINLEY *v.* CITY OF RIVERSIDE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 813 F. 2d 254 (first case); 819 F. 2d 1146 (second case).

No. 87–78. PERRY *v.* RAPOSO. C. A. 9th Cir. Certiorari denied.

No. 87–80. VIDA, PERSONAL REPRESENTATIVE OF THE ESTATE OF VIDA *v.* PATAPSCO & BACK RIVERS RAILROAD CO. C. A. 4th Cir. Certiorari denied. Reported below: 814 F. 2d 655.

No. 87–81. CHEEK *v.* LOS ANGELES POLICE DEPARTMENT ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 87–83. CITY OF PITTSBURGH, PENNSYLVANIA, ET AL. *v.* SULLIVAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 811 F. 2d 171.

No. 87–84. E. I. DU PONT DE NEMOURS & CO., INC. *v.* JOHANSEN. C. A. 5th Cir. Certiorari denied. Reported below: 810 F. 2d 1377.

No. 87–85. BUSHONG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 805 F. 2d 391.

No. 87–88. MABRY *v.* STATE BOARD FOR COMMUNITY COLLEGES AND OCCUPATIONAL EDUCATION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 813 F. 2d 311.

No. 87–90. BURTON, BY HER FATHER AND NEXT FRIEND AND NATURAL GUARDIAN, BURTON, ET AL. *v.* WILCOX ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 793 F. 2d 1289.

No. 87–91. BREWSTER *v.* MOUNT VERNON HOSPITAL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 838 F. 2d 465.

No. 87–93. FUSCO ET UX. *v.* CONNECTICUT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 815 F. 2d 201.

No. 87–94. AMERICAN CYANAMID CO. *v.* DOW CHEMICAL CO. C. A. Fed. Cir. Certiorari denied. Reported below: 816 F. 2d 617.

No. 87–95. HAGEBUSH ET AL. *v.* FIRST NATIONAL BANK OF OMAHA; and HAGEBUSH ET AL. *v.* NEBRASKA STATE BAR ASSN. ET AL. Sup. Ct. Neb. Certiorari denied. Reported below: 225 Neb. 711, 407 N. W. 2d 787 (first case); 225 Neb. xxvi (second case).

No. 87–96. ONETT *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. Reported below: 504 So. 2d 388.

No. 87–99. ARCHER *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 24 M. J. 330.

No. 87–101. HERBSTER *v.* NORTH AMERICAN COMPANY FOR LIFE & HEALTH INSURANCE. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 150 Ill. App. 3d 21, 501 N. E. 2d 343.

No. 87–102. FIRST AFFILIATED SECURITIES, INC., ET AL. *v.* SULLIVAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 813 F. 2d 1368.

No. 87–105. COMBS *v.* SEABOARD SYSTEM RAILROAD, INC. Ct. App. Ky. Certiorari denied.

No. 87–106. HART ET AL. *v.* ZAMORA, EXECUTOR OF THE ESTATE OF ZAMORA. C. A. 9th Cir. Certiorari denied. Reported below: 812 F. 2d 716.

No. 87–108. FURGATCH *v.* FEDERAL ELECTION COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 807 F. 2d 857.

No. 87–109. CREAMER *v.* RAFFETY ET AL. Ct. App. Ariz. Certiorari denied.

No. 87–110. TERRY *v.* NEW YORK. County Court, Broome County, N. Y. Certiorari denied.

No. 87–111. 5 WEST 14TH OWNERS CORP. *v.* WEST 14TH STREET COMMERCIAL CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 815 F. 2d 188.

No. 87–112. UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL–CIO, LOCAL 2247, ET AL. *v.* ENDICOTT ENTERPRISES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 806 F. 2d 918.

No. 87–114. MAGYAR ET UX. *v.* UNITED FIRE INSURANCE CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 811 F. 2d 1330.

No. 87–115. OLAVARRIETA *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 812 F. 2d 640.

No. 87–117. OKC LIMITED PARTNERSHIP *v.* PHILLIPS OIL CO. C. A. 5th Cir. Certiorari denied. Reported below: 812 F. 2d 265.

No. 87–118. MAYNARD *v.* PRIESTER. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 87–122. MOSCO *v.* BALTIMORE & OHIO RAILROAD CO. C. A. 4th Cir. Certiorari denied. Reported below: 817 F. 2d 1088.

No. 87–124. TAFOYA *v.* ADAMS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 816 F. 2d 555.

No. 87–125. NEC ELECTRONICS INC. *v.* CAL CIRCUIT ABCO, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 810 F. 2d 1506.

No. 87–127. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 816 F. 2d 675.

No. 87–128. POSTEL *v.* TEXAS WATER DEVELOPMENT BOARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 816 F. 2d 675.

No. 87–130. BELL ET AL. *v.* TEAMSTERS LOCAL UNION NO. 317, SYRACUSE, NEW YORK, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 819 F. 2d 1129.

No. 87–132. PENNSYLVANIA DENTAL ASSN. ET AL. *v.* MEDICAL SERVICE ASSOCIATION OF PENNSYLVANIA, DBA PENNSYLVANIA BLUE SHIELD. C. A. 3d Cir. Certiorari denied. Reported below: 815 F. 2d 270.

No. 87–136. SPAGNUOLO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 815 F. 2d 81.

No. 87–139. CITY AND BOROUGH OF SITKA *v.* R. W. BECK & ASSOCIATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 812 F. 2d 715.

No. 87–143. WELLS *v.* VIRGINIA COMMONWEALTH UNIVERSITY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 816 F. 2d 674.

No. 87–149. NIEDZWIECKI *v.* CITY OF BRIDGEPORT. App. Ct. Conn. Certiorari denied. Reported below: 9 Conn. App. 807, 518 A. 2d 406.

No. 87–150. KARL SCHERMER & CO. *v.* ALPHA INTERNATIONAL ET AL. Super. Ct. N. J., Law Div., Union County. Certiorari denied.

No. 87–151. YATES *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 24 M. J. 114.

No. 87–152. BERGMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 813 F. 2d 1027.

No. 87–155. NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK) *v.* CUMMINGS ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 514 Pa. 230, 523 A. 2d 338.

No. 87–164. BROTHERHOOD OF TEAMSTERS & AUTO TRUCK DRIVERS LOCAL 70 OF ALAMEDA COUNTY ET AL. *v.* WESTERN PACIFIC RAILROAD CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 809 F. 2d 607.

No. 87–165. LOGAN *v.* ABSHIRE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 819 F. 2d 289.

No. 87–166. HILL ET AL. *v.* CHILEAN LINE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 815 F. 2d 699.

No. 87–167. MAREK ET VIR *v.* MARPAN TWO, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 817 F. 2d 242.

No. 87–172. DUNLAP, DBA AMERICAN ARCADE *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 292 Ark. 51, 728 S. W. 2d 155.

No. 87–175. TANGO *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 87–177. QUAST *v.* QUAST. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 498 So. 2d 1307.

No. 87–178. PACIFIC GAS & ELECTRIC CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 87–181. SRULOWITZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 819 F. 2d 37.

No. 87–182. ALOE COAL CO. ET AL. *v.* CLARK EQUIPMENT CO. C. A. 3d Cir. Certiorari denied. Reported below: 816 F. 2d 110.

No. 87–184. SCHARFFE *v.* PERKINS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 817 F. 2d 392.

No. 87–185. PAYNE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 812 F. 2d 1403.

No. 87–187. WRIGHT *v.* CAYAN. C. A. 2d Cir. Certiorari denied. Reported below: 817 F. 2d 999.

No. 87–189. KING ET VIR *v.* CLARE ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 356 Pa. Super. 595, 512 A. 2d 56.

No. 87–190. MARTIN *v.* ST. JOE CONTAINER CO. C. A. 6th Cir. Certiorari denied. Reported below: 817 F. 2d 105.

No. 87–191. FLAMM ET VIR *v.* EBERSTADT ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 814 F. 2d 1169.

No. 87–192. FUNNELL, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF FUNNELL, ET AL. *v.* JONES ET AL. Sup. Ct. Okla. Certiorari denied. Reported below: 737 P. 2d 105.

No. 87–194. TI-COATING, INC. *v.* SCHWARZKOPF DEVELOPMENT CORP. C. A. 2d Cir. Certiorari denied. Reported below: 816 F. 2d 670.

No. 87–195. PENK ET AL. *v.* OREGON STATE BOARD OF HIGHER EDUCATION. C. A. 9th Cir. Certiorari denied. Reported below: 816 F. 2d 458.

No. 87–196. DOBBS *v.* FORD MOTOR CO. ET AL. (two cases). C. A. 3d Cir. Certiorari denied. Reported below: 819 F. 2d 1132.

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No. 87–197. GENERAL AMERICAN COMMUNICATIONS CORP. ET AL. *v.* NOTTINGHAM ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 811 F. 2d 873.

No. 87–198. SERRANO *v.* CITY OF GARY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 818 F. 2d 32.

No. 87–199. COEUR D'ALENE TRIBE OF INDIANS *v.* IDAHO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 814 F. 2d 1288.

No. 87–200. VANYA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 817 F. 2d 1235.

No. 87–202. FONG ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 816 F. 2d 684.

No. 87–203. HARVEY *v.* SUBATCH. C. A. 1st Cir. Certiorari denied. Reported below: 808 F. 2d 1513.

No. 87–207. KERR *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 361 Pa. Super. 635, 517 A. 2d 1365.

No. 87–209. SHERMAN COLLEGE OF STRAIGHT CHIROPRACTIC ET AL. *v.* AMERICAN CHIROPRACTIC ASSN., INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 813 F. 2d 349.

No. 87–210. PRICE *v.* WARNECKE. C. A. 9th Cir. Certiorari denied. Reported below: 789 F. 2d 921.

No. 87–214. MOORE ET AL. *v.* BOATING INDUSTRY ASSNS. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 819 F. 2d 693.

No. 87–218. YEITER, A LEGALLY INCAPACITATED PERSON, BY AND THROUGH HER GUARDIAN, YEITER *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 818 F. 2d 8.

No. 87–219. BASTIEN ET AL. *v.* R. ROWLAND & CO., INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 815 F. 2d 713.

No. 87–221. FOREMAN *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 153 Ill. App. 3d 346, 505 N. E. 2d 731.

No. 87-223. SEABOARD SURETY CO. ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 817 F. 2d 956.

No. 87-227. SLOVACEK *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 24 M. J. 140.

No. 87-228. ALUMINA PARTNERS OF JAMAICA *v.* CABLE BELT CONVEYORS, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 857 F. 2d 1461.

No. 87-232. LEICHIHMAN *v.* PICKWICK INTERNATIONAL ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 814 F. 2d 1263.

No. 87-233. HAYES *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 507 So. 2d 995.

No. 87-235. GIRY ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 818 F. 2d 120.

No. 87-236. CAMPBELL *v.* BOEING CO. Ct. App. Wash. Certiorari denied.

No. 87-238. COBB *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 818 F. 2d 30.

No. 87-242. YARBROUGH, IN DERIVATIVE ACTION ON BEHALF OF LAVENDER HOUSE, INC. *v.* SMALL BUSINESS ADMINISTRATION. C. A. 3d Cir. Certiorari denied. Reported below: 800 F. 2d 1138.

No. 87-243. BROWN *v.* PATTERSON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 823 F. 2d 167.

No. 87-254. SMITH *v.* MARTIN, GOVERNOR OF NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 816 F. 2d 673.

No. 87-285. DOWELL, FOR DOWELL, DECEASED *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 816 F. 2d 679.

No. 87-288. SAMPANG *v.* MARSH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 813 F. 2d 1228.

No. 87-290. ROMAN *v.* SUNNY SLOPE FARMS, INC. C. A. 4th Cir. Certiorari denied. Reported below: 817 F. 2d 1116.

No. 87–295. BARRETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 818 F. 2d 330.

No. 87–301. MITCHELL ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 787 F. 2d 466.

No. 87–306. CONDREN ET AL. *v.* AIRCRAFT TRADING & SERVICES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 819 F. 2d 1227.

No. 87–310. WIEGAND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 812 F. 2d 1239.

No. 87–321. O'CONNOR *v.* ESTATE OF MILHOLLAN ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 103 Nev. 815.

No. 87–322. CHASE REVEL, INC., DBA ENTREPRENEUR MAGAZINE *v.* STRAW, DBA BUSINESS OPPORTUNITIES DIGEST. C. A. 11th Cir. Certiorari denied. Reported below: 813 F. 2d 356.

No. 87–335. CRISP *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 817 F. 2d 256.

No. 87–5001. RUSSELL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 727 S. W. 2d 573.

No. 87–5003. WAGSTAFF-EL *v.* RUPPERSBERG, WHITE, WINTER, CLARK & MISTER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 812 F. 2d 1402.

No. 87–5005. ROBINSON *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 815 F. 2d 705.

No. 87–5006. YOUNG *v.* UNITED BANK OF BISMARCK ET AL. Sup. Ct. N. D. Certiorari denied. Reported below: 401 N. W. 2d 517.

No. 87–5007. WEAVER *v.* PARKER, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 812 F. 2d 1413.

No. 87–5009. O'CONNOR *v.* TAYLOR ET AL. C. A. 11th Cir. Certiorari denied.

No. 87–5010. HATTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 818 F. 2d 869.

No. 87–5012. COLUNGA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 812 F. 2d 196.

No. 87–5013. ANDREWS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 817 F. 2d 1277.

No. 87–5014. DIAZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 814 F. 2d 454.

No. 87–5015. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 817 F. 2d 268.

No. 87–5016. FONFRIAS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 816 F. 2d 823.

No. 87–5017. FOREMAN *v.* INTERNAL REVENUE SERVICE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 817 F. 2d 758.

No. 87–5018. BUCK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 813 F. 2d 588.

No. 87–5019. BOLES *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 816 F. 2d 1132.

No. 87–5020. TUBBS ET AL. *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 87–5021. EASLEY *v.* KOSCINSKI ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 817 F. 2d 751.

No. 87–5022. JEWELL *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 126 App. Div. 2d 567, 510 N. Y. S. 2d 686.

No. 87–5023. VAN SANT *v.* ARLINGTON COUNTY, VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 816 F. 2d 674.

No. 87–5024. MIXON *v.* NEW ORLEANS POLICE DEPARTMENT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 816 F. 2d 675.

No. 87–5026. SAUNDERS *v.* RASKIN ET AL. C. A. 3d Cir. Certiorari denied.

No. 87–5027. VILLALOBOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 815 F. 2d 1493.

No. 87–5028. MITCHELL *v.* OFFICE OF THE LOS ANGELES COUNTY SUPERINTENDENT OF SCHOOLS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 805 F. 2d 844.

No. 87–5030. NICHOLAS *v.* KULBETH. C. A. 1st Cir. Certiorari denied.

No. 87–5034. LICKER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 87–5035. HANSON *v.* BOARD OF ATTORNEYS PROFESSIONAL RESPONSIBILITY OF WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 136 Wis. 2d 536, 402 N. W. 2d 707.

No. 87–5036. GROSS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 69 Md. App. 792.

No. 87–5041. RODGER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 822 F. 2d 1092.

No. 87–5043. MONTGOMERY *v.* WHITLEY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 87–5044. SHIELDS *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 813 F. 2d 1123.

No. 87–5047. PAREZ *v.* CITY AND COUNTY OF SAN DIEGO. C. A. 9th Cir. Certiorari denied. Reported below: 812 F. 2d 1411.

No. 87–5049. BALDWIN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 813 F. 2d 1230.

No. 87–5051. HUGHES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 817 F. 2d 268.

No. 87–5055. DUNCAN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 87–5056. WYATT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 807 F. 2d 1480.

No. 87–5058. O'DELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 805 F. 2d 637.

No. 87–5059. PRENZLER *v.* SUPERIOR COURT OF CALIFORNIA, ORANGE COUNTY. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 87–5060. SMITH *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 819 F. 2d 1139.

No. 87–5061. ROBINSON *v.* DELAWARE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 817 F. 2d 752.

No. 87–5063. CADE ET AL. *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied.

No. 87–5067. ANNONSON *v.* GROVER ET AL. Sup. Ct. Wis. Certiorari denied. Reported below: 136 Wis. 2d 564, 407 N. W. 2d 561.

No. 87–5068. FREEMAN *v.* HATFIELD. C. A. 4th Cir. Certiorari denied. Reported below: 816 F. 2d 671.

No. 87–5069. DINITZ *v.* JUSTICES OF THE SUPREME COURT OF KINGS COUNTY. Ct. App. N. Y. Certiorari denied. Reported below: 69 N. Y. 2d 607, 507 N. E. 2d 321.

No. 87–5071. EULER-MARKUS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 817 F. 2d 759.

No. 87–5072. D'AMARIO *v.* PROVIDENCE CIVIC CENTER AUTHORITY ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 815 F. 2d 692.

No. 87–5073. GARCIA *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 24 M. J. 69.

No. 87–5074. BELL *v.* COLORADO. Sup. Ct. Colo. Certiorari denied.

No. 87–5075. LEE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 70 N. Y. 2d 649, 512 N. E. 2d 568.

No. 87–5076. FLOYD *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 10 Conn. App. 361, 523 A. 2d 1323.

No. 87–5078. BUTTS *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 816 F. 2d 686.

No. 87–5079. COGSHELL *v.* GENERAL MOTORS CORP. C. A. 10th Cir. Certiorari denied.

No. 87–5080. BASNIGHT *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 87–5081. GILBERT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 813 F. 2d 1523.

No. 87–5084. FOSTER *v.* MENCL ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 815 F. 2d 712.

No. 87–5086. FURLOUGH *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 815 F. 2d 715.

No. 87–5087. HUFFAKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 817 F. 2d 108.

No. 87–5088. KRAPP *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 815 F. 2d 1183.

No. 87–5090. COLEMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 818 F. 2d 872.

No. 87–5091. REDD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 818 F. 2d 864.

No. 87–5093. BEARD *v.* DUTTON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 820 F. 2d 405.

No. 87–5094. WERNER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 819 F. 2d 1136.

No. 87–5097. ONAFOWOKAN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 259 U. S. App. D. C. 293, 815 F. 2d 724.

No. 87–5099. MCCOY *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 87–5101. GANTOS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 817 F. 2d 41.

No. 87–5104. GILBERT *v.* ALABAMA. C. A. 11th Cir. Certiorari denied. Reported below: 815 F. 2d 716.

No. 87–5108. YOUNG *v.* HAWAII. Sup. Ct. Haw. Certiorari denied.

No. 87–5109. BRAMLET *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 820 F. 2d 851.

No. 87–5110. GAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 816 F. 2d 614.

No. 87–5111. KENNARD *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 531 So. 2d 934.

No. 87–5112. MALIK *v.* BALL ET AL. C. A. 2d Cir. Certiorari denied.

No. 87–5113. MALIK *v.* COSTELLO. C. A. 2d Cir. Certiorari denied. Reported below: 857 F. 2d 1461.

No. 87–5114. PENIX *v.* JAGO, SUPERINTENDENT, LONDON CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied. Reported below: 815 F. 2d 79.

No. 87–5116. PERLAZA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 818 F. 2d 1354.

No. 87–5118. ROTH *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 362 Pa. Super. 639, 520 A. 2d 1216.

No. 87–5119. SEIGLER *v.* BAIR, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 818 F. 2d 861.

No. 87–5120. VALENCIANO *v.* TEXAS. Ct. App. Tex., 4th Dist. Certiorari denied. Reported below: 705 S. W. 2d 339.

No. 87–5121. LOVE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 815 F. 2d 53.

No. 87–5123. THOMAS *v.* HUMFIELD ET AL. C. A. 5th Cir. Certiorari denied.

No. 87–5127. DANIELS *v.* WOOD, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 819 F. 2d 195.

No. 87–5128. SULLIVAN *v.* MINNESOTA. C. A. 8th Cir. Certiorari denied. Reported below: 818 F. 2d 664.

No. 87–5129. SPANN *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 505 So. 2d 1021.

No. 87–5131. FIXEL *v.* WARDEN, NORTHERN NEVADA CORRECTIONAL CENTER, ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 103 Nev. 803.

No. 87–5132. GERHARD *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 515 Pa. 574, 527 A. 2d 535.

No. 87–5133. SAVAGE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 819 F. 2d 1139.

No. 87–5135. RUSHTON *v.* TEXAS. Ct. App. Tex., 13th Dist. Certiorari denied. Reported below: 698 S. W. 2d 451.

No. 87–5136. BRYANT *v.* MCGINNIS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 819 F. 2d 1144.

No. 87–5138. MARTINEZ *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 502 So. 2d 910.

No. 87–5140. GRAYS *v.* GORDON. C. A. 5th Cir. Certiorari denied.

No. 87–5141. ESPENSHADE *v.* PENNSYLVANIA STATE UNIVERSITY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 815 F. 2d 694.

No. 87–5142. JOHNSON *v.* RUCKER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 820 F. 2d 1224.

No. 87–5144. SMITH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 857 F. 2d 1462.

No. 87–5145. SPEARMAN *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Ct. Crim. App. Tex. Certiorari denied.

No. 87–5146. OAKLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 817 F. 2d 753.

No. 87–5148. STURDIVANT *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 507 So. 2d 1008.

No. 87–5151. KOST *v.* CAPITOL CORP. ET AL. C. A. 10th Cir. Certiorari denied.

No. 87–5158. VRTISKA *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 225 Neb. 454, 406 N. W. 2d 114.

No. 87–5159. BARNES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 819 F. 2d 1141.

No. 87–5162. SMITH *v.* WHITE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 815 F. 2d 1401.

No. 87–5164. WALKER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 817 F. 2d 461.

No. 87–5165. GARDNER *v.* MALONEY, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 817 F. 2d 183.

No. 87–5166. BAXTER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 149 Ill. App. 3d 1157, 514 N. E. 2d 606.

No. 87–5171. NATHAN *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 87–5174. PONDER ET AL. *v.* FULTON-DEKALB HOSPITAL AUTHORITY, DBA GRADY MEMORIAL HOSPITAL. Sup. Ct. Ga. Certiorari denied. Reported below: 256 Ga. 833, 353 S. E. 2d 515.

No. 87–5175. PIKO *v.* OKU, ADMINISTRATOR, HALAWA HIGH SECURITY FACILITY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 816 F. 2d 684.

No. 87–5176. DODSON *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 819 F. 2d 1133.

No. 87–5177. BRIGHT *v.* CITY OF ATLANTA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 815 F. 2d 716.

No. 87–5178. DOBSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 823 F. 2d 549.

No. 87–5180. DOOLEY *v.* PETSOCK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICA-

TION CENTER AT PITTSBURGH. C. A. 3d Cir. Certiorari denied. Reported below: 816 F. 2d 885.

No. 87–5181. GRANT *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 69 N. Y. 2d 1004, 511 N. E. 2d 96.

No. 87–5184. SUEING *v.* HEFFRON, SHERIFF OF KENT COUNTY. C. A. 6th Cir. Certiorari denied. Reported below: 815 F. 2d 706.

No. 87–5185. PRENZLER *v.* ORANGE COUNTY BOARD OF SUPERVISORS. C. A. 9th Cir. Certiorari denied.

No. 87–5186. YOUNG *v.* COUGHLIN, COMMISSIONER, NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 823 F. 2d 545.

No. 87–5187. SMITH *v.* WOODS ET AL. C. A. 8th Cir. Certiorari denied.

No. 87–5189. WILLIAMS *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 11th Cir. Certiorari denied.

No. 87–5190. ANGLIN *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 819 F. 2d 289.

No. 87–5191. HOWARD *v.* DAVIS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 815 F. 2d 1429.

No. 87–5197. ATAMIAN *v.* RUBIN ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 107 N. J. 147, 526 A. 2d 208.

No. 87–5198. KENYATTA *v.* VASSAR ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 819 F. 2d 1138.

No. 87–5200. ROBERTS *v.* DILL ET AL. C. A. 8th Cir. Certiorari denied.

No. 87–5202. PAOLI *v.* LALLY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 812 F. 2d 1489.

No. 87–5204. WILLIAMS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 87–5207. KAJITA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 819 F. 2d 1146.

No. 87–5209. ARANGO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 820 F. 2d 1221.

No. 87–5210. JAMES *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 813 F. 2d 1228.

No. 87–5211. HOWELL *v.* DUCKWORTH ET AL. C. A. 7th Cir. Certiorari denied.

No. 87–5213. BARNES *v.* SAMBERG, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 818 F. 2d 861.

No. 87–5214. BECKLIN *v.* HAWAII. Sup. Ct. Haw. Certiorari denied.

No. 87–5216. GRAVES *v.* JONES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 87–5217. OGRIZOVICH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 816 F. 2d 681.

No. 87–5218. RYAN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 117 Ill. 2d 28, 509 N. E. 2d 1001.

No. 87–5219. TAYLOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 814 F. 2d 172.

No. 87–5220. MAURO *v.* BOARD OF HIGHER EDUCATION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 819 F. 2d 1130.

No. 87–5221. MARR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 819 F. 2d 1542.

No. 87–5225. HOPPINS *v.* ALABAMA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 822 F. 2d 64.

No. 87–5226. KENDALL *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 87–5227. DITGES *v.* SANBORN ET AL. C. A. 10th Cir. Certiorari denied.

No. 87–5229. RAPRAGER *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 156 Ill. App. 3d 1172, 522 N. E. 2d 360.

No. 87–5232. WILLIAMS *v.* JOINER. C. A. 7th Cir. Certiorari denied. Reported below: 818 F. 2d 33.

No. 87–5235. WILLIAMS *v.* CITY OF WASHINGTON, D. C., ET AL. C. A. D. C. Cir. Certiorari denied.

No. 87–5236. THOMAS *v.* WARDEN, MARYLAND HOUSE OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 820 F. 2d 1220.

No. 87–5237. WARREN *v.* WYOMING, MICHIGAN, POLICE DEPARTMENT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 815 F. 2d 706.

No. 87–5238. SMITH *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 188 Cal. App. 3d 1495, 234 Cal. Rptr. 142.

No. 87–5239. RAITPORT *v.* EVERSHINE, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 857 F. 2d 1461.

No. 87–5240. HOFFLER *v.* A & H GARCIA TRASH HAULING, INC. Ct. App. D. C. Certiorari denied.

No. 87–5242. VAN SANT *v.* HUDSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 816 F. 2d 674.

No. 87–5243. MORGAN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 152 Ill. App. 3d 97, 504 N. E. 2d 172.

No. 87–5245. GENTRY *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 815 F. 2d 77.

No. 87–5249. WALKER *v.* LEAK, DIRECTOR, DEPARTMENT OF CORRECTIONS, COOK COUNTY, ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 116 Ill. 2d 413, 507 N. E. 2d 849.

No. 87–5250. SWEENEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 817 F. 2d 1323.

No. 87–5252. JOHNSON *v.* CHANDLER, MAYOR, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 816 F. 2d 680.

No. 87–5253. ABAYOMI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 820 F. 2d 902.

No. 87–5254. ALLAH *v.* LEFEVRE, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 819 F. 2d 1129.

No. 87–5255. BEJARANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 817 F. 2d 755.

No. 87–5260. WILLIAMS *v.* BROWN. C. A. 6th Cir. Certiorari denied. Reported below: 822 F. 2d 60.

No. 87–5262. BULLED *v.* GRIFFIN ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 820 F. 2d 1229.

No. 87–5263. BRYAN *v.* WARDEN, INDIANA STATE REFORMATORY. C. A. 7th Cir. Certiorari denied. Reported below: 820 F. 2d 217.

No. 87–5264. FOSTER *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 824 F. 2d 970.

No. 87–5270. MARTIN *v.* TOWNSEND ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 826 F. 2d 1056.

No. 87–5271. ROMERO-ROMERO *v.* UNITED STATES; and
No. 87–5281. GOMEZ-PARRA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 813 F. 2d 1229.

No. 87–5274. MASON *v.* BRASHER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 820 F. 2d 405.

No. 87–5275. SHIPLEY *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 87–5276. EAGLE ELK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 820 F. 2d 959.

No. 87–5278. MCGILL *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 87–5279. WALLACE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 815 F. 2d 74.

No. 87–5280. ZATKO *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 87–5282. PINKINS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 514 Pa. 418, 525 A. 2d 1189.

No. 87–5285. STEWART *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 820 F. 2d 1107.

No. 87–5286. HOLMES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 822 F. 2d 1090.

No. 87–5287. LAWSON *v.* OKLAHOMA EX REL. OKLAHOMA BAR ASSN. Sup. Ct. Okla. Certiorari denied.

No. 87–5289. VASS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 819 F. 2d 1131.

No. 87–5290. MOORE *v.* ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER AT GRATERFORD. C. A. 3d Cir. Certiorari denied. Reported below: 822 F. 2d 53.

No. 87–5291. MELIA *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied.

No. 87–5293. SANDIDGE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 520 A. 2d 1057.

No. 87–5297. RIVERA *v.* WELLS FARGO CREDIT CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 820 F. 2d 1228.

No. 87–5303. TRATAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 818 F. 2d 870.

No. 87–5305. TISDALE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 817 F. 2d 1552.

No. 87–5306. PASKINS ET AL. *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 154 Ill. App. 3d 417, 506 N. E. 2d 1037.

No. 87–5308. THACKER ET UX. *v.* GREAT AMERICAN INSURANCE CO. C. A. 4th Cir. Certiorari denied. Reported below: 812 F. 2d 1402.

No. 87–5309. DE LA CERDA *v.* CHEMEKETA COMMUNITY COLLEGE DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 812 F. 2d 714.

No. 87–5317. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 817 F. 2d 757.

No. 87–5324. RODGER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 815 F. 2d 712.

No. 87–5326. KING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 820 F. 2d 1220.

No. 87–5339. MASSEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 823 F. 2d 557.

No. 87–5342. NEALY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 818 F. 2d 30.

No. 87–5358. SAULSBERRY *v.* BARKSDALE, SHERIFF OF SHELBY COUNTY, TENNESSEE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 817 F. 2d 757.

No. 87–5368. BARCO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 810 F. 2d 1165.

No. 87–5372. NOVACHICH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 820 F. 2d 1225.

No. 87–5386. PARKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 823 F. 2d 556.

No. 87–5395. MUNOZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 857 F. 2d 1462.

No. 87–5397. SILVA-PIEDRAHITA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 819 F. 2d 1140.

No. 86–1170. MCKINNEY *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and reverse the judgment of conviction. Reported below: 718 S. W. 2d 583.

No. 86–1470. CROWLEY ET AL. *v.* SHULTZ, SECRETARY OF STATE, ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 255 U. S. App. D. C. 422, 802 F. 2d 498.

No. 86–1871. NATIONAL FUEL GAS SUPPLY CORP. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 258 U. S. App. D. C. 374, 811 F. 2d 1563.

No. 86–1967. TAVOULAREAS *v.* WASHINGTON POST CO. ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 260 U. S. App. D. C. 39, 817 F. 2d 762.

No. 86–1627. CITY OF ANGOON ET AL. *v.* HODEL, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Motion of Nunam Kitlutsisti for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 803 F. 2d 1016.

No. 86–1681. RUSSO ET AL. *v.* MITCHELL ET AL. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE and JUSTICE SCALIA took no part in the consideration or decision of this petition. Reported below: 257 U. S. App. D. C. 59, 807 F. 2d 204.

No. 86–1704. MAYNARD, WARDEN, ET AL. *v.* DUTTON. C. A. 10th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 812 F. 2d 593.

No. 86–1936. MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS *v.* WILSON. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 806 F. 2d 1232.

No. 86–1943. MCCARTHY, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS *v.* CARTER. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 806 F. 2d 1373.

No. 86–2064. PIPES ET AL. *v.* BENNY. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 799 F. 2d 489.

No. 87–89. FOLTZ, WARDEN *v.* THOMAS. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 818 F. 2d 476.

No. 87–97. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* BUNDY. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 816 F. 2d 564.

No. 87–213. KINCHELOE *v.* HAYES. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 784 F. 2d 1434.

No. 86–1712. TRANSAMERICAN NATURAL GAS CORP. *v.* UNITED STATES DEPARTMENT OF THE INTERIOR ET AL. Temp. Emerg. Ct. App. Motion of petitioner to defer consideration of the petition for certiorari denied. Certiorari denied. Reported below: 816 F. 2d 689.

No. 86–1719. EXECUTIVE COMMITTEE MEMBERS ET AL. *v.* UNION OF INDIA ET AL.; and

No. 86–1860. UNION OF INDIA *v.* UNION CARBIDE CORP. ET AL. C. A. 2d Cir. Motion of National Council of Churches of Christ in the U. S. A. for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 809 F. 2d 195.

No. 86–1733. FOUNDING CHURCH OF SCIENTOLOGY OF WASHINGTON, D. C. *v.* DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition. Reported below: 256 U. S. App. D. C. 54, 802 F. 2d 1448.

No. 86–1767. WALTON ET UX. *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., San Diego County. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and reverse the judgment.

No. 86–1870. CRONSON, AUDITOR GENERAL OF ILLINOIS *v.* CLARK, CHIEF JUSTICE, SUPREME COURT OF ILLINOIS, ET AL. C. A. 7th Cir. Motion of petitioner to consider this case with No. 86–1773, *Cronson, Auditor General of Illinois* v. *Madden, Acting Director, Administrative Office of the Illinois Courts*, granted. Certiorari denied. Reported below: 810 F. 2d 662.

No. 86–1981. SUN SHIP, INC. *v.* CALIFORNIA & HAWAIIAN SUGAR CO. ET AL. C. A. 9th Cir. Motion of respondent California & Hawaiian Sugar Co. for damages denied. Certiorari denied. Reported below: 794 F. 2d 1433.

No. 86–1990. WEST 14TH STREET COMMERCIAL CORP. ET AL. *v.* 5 WEST 14TH OWNERS CORP. C. A. 2d Cir. Motion of Council for Owner-Occupied Housing, Inc., for leave to file a brief as

amicus curiae granted. Certiorari denied. Reported below: 815 F. 2d 188.

No. 86-2042. STANDLEY ET AL. *v.* UNITED STATES TAX COURT (COMMISSIONER OF INTERNAL REVENUE, REAL PARTY IN INTEREST). C. A. 9th Cir. Motion of petitioners to consolidate this case with No. 86-1217, *Russoniello et al.* v. *Olagues et al.* [certiorari granted, 481 U. S. 1012], denied. Certiorari denied.

No. 86-2068. HARDIN *v.* MCMASTER. C. A. 5th Cir. Motion of petitioner for leave to proceed as a veteran denied. Certiorari denied. Reported below: 816 F. 2d 675.

No. 86-6765. MARQUEZ *v.* TEXAS. Ct. Crim. App. Tex.;
No. 86-6845. JOHNSON *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir.;
No. 86-6855. HOGAN *v.* NEVADA. Sup. Ct. Nev.;
No. 86-6865. SNELL *v.* ARKANSAS. Sup. Ct. Ark.;
No. 86-6878. ALLEN *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 86-6880. RECTOR *v.* TEXAS. Ct. Crim. App. Tex.;
No. 86-6887. SOUTH *v.* SOUTH CAROLINA. Ct. Common Pleas of Lexington County, S. C.;
No. 86-6904. CANTU *v.* TEXAS. Ct. Crim. App. Tex.;
No. 86-6933. JEFFERSON *v.* GEORGIA. Sup. Ct. Ga.;
No. 86-6937. HOWARD *v.* NEVADA. Sup. Ct. Nev.;
No. 86-6941. BYRD *v.* MISSOURI. Ct. App. Mo., Eastern Dist.;
No. 86-6953. THOMPSON *v.* ALABAMA. Sup. Ct. Ala.;
No. 86-6978. BOBO *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 86-6983. AUSTIN *v.* TENNESSEE. Ct. Crim. App. Tenn.;
No. 86-6989. GRANVIEL *v.* TEXAS. Ct. Crim. App. Tex.;
No. 86-7005. SPARKS *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 86-7015. PERRY *v.* LOUISIANA. Sup. Ct. La.;
No. 86-7022. JOHNSON *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir.;
No. 86-7040. LAGRAND *v.* ARIZONA. Sup. Ct. Ariz.;
No. 86-7061. PALMER *v.* NEBRASKA. Sup. Ct. Neb.;
No. 86-7074. LINGAR *v.* MISSOURI. Sup. Ct. Mo.;
No. 86-7082. MAY *v.* TEXAS. Ct. Crim. App. Tex.;
No. 86-7103. HARRIS *v.* TEXAS. Ct. Crim. App. Tex.;
No. 86-7112. LAGRAND *v.* ARIZONA. Sup. Ct. Ariz.;

No. 86-7114. GRAY *v.* VIRGINIA. Sup. Ct. Va.;

No. 86-7129. POPE *v.* GEORGIA. Sup. Ct. Ga.;

No. 87-5011. DAVIS *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla.;

No. 87-5025. HILL *v.* ARKANSAS. Sup. Ct. Ark.;

No. 87-5029. CHRISTIANSEN *v.* ILLINOIS. Sup. Ct. Ill.;

No. 87-5033. BUSH *v.* FLORIDA. Sup. Ct. Fla.;

No. 87-5040. WORKMAN *v.* TENNESSEE. Ct. Crim. App. Tenn.;

No. 87-5042. DEMPS *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir.;

No. 87-5089. BOLENDER *v.* FLORIDA. Sup. Ct. Fla.;

No. 87-5098. MCNISH *v.* TENNESSEE. Sup. Ct. Tenn.;

No. 87-5100. GUINAN *v.* MISSOURI. Ct. App. Mo., Eastern Dist.;

No. 87-5117. FELDE *v.* BUTLER, WARDEN. C. A. 5th Cir.;

No. 87-5139. TITONE *v.* ILLINOIS. Sup. Ct. Ill.;

No. 87-5152. BANKS *v.* PENNSYLVANIA. Sup. Ct. Pa.;

No. 87-5192. BROWN *v.* KEMP, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. Super. Ct. Ga., Butts County;

No. 87-5203. WILLIAMS *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla.;

No. 87-5215. BATES *v.* FLORIDA. Sup. Ct. Fla.;

No. 87-5258. SILAGY *v.* ILLINOIS. Sup. Ct. Ill.; and

No. 87-5268. MOORE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: No. 86-6765, 725 S. W. 2d 217; No. 86-6845, 778 F. 2d 623; No. 86-6855, 103 Nev. 21, 732 P. 2d 422; No. 86-6865, 290 Ark. 503, 721 S. W. 2d 628; No. 86-6878, 42 Cal. 3d 1222, 729 P. 2d 115; No. 86-6880, 738 S. W. 2d 235; No. 86-6904, 738 S. W. 2d 249; No. 86-6933, 256 Ga. 821, 353 S. E. 2d 468; No. 86-6937, 102 Nev. 572, 729 P. 2d 1341; No. 86-6941, 723 S. W. 2d 37; No. 86-6953, 503 So. 2d 887; No. 86-6978, 727 S. W. 2d 945; No. 86-6989, 723 S. W. 2d 141; No. 86-7005, 727 S. W. 2d 480; No. 86-7015, 502 So. 2d 543; No. 86-7022, 806 F. 2d 1479; No. 86-7040, 152 Ariz. 483, 733 P. 2d 1066; No. 86-7061, 224 Neb. 282, 399 N. W. 2d 706; No. 86-7074, 726 S. W. 2d 728; No. 86-7082, 738 S. W. 2d 261; No. 86-7103, 738 S. W. 2d 207; No. 86-7112, 153 Ariz. 21, 734 P. 2d 563; No. 86-7114, 233 Va. 313, 356 S. E. 2d 157; No. 86-7129, 257 Ga. 32, 354 S. E. 2d 429;

No. 87–5011, 498 So. 2d 857; No. 87–5025, 292 Ark. 144, 728 S. W. 2d 510; No. 87–5029, 116 Ill. 2d 96, 506 N. E. 2d 1253; No. 87–5033, 505 So. 2d 409; No. 87–5042, 805 F. 2d 1426; No. 87–5089, 503 So. 2d 1247; No. 87–5098, 727 S. W. 2d 490; No. 87–5100, 726 S. W. 2d 754; No. 87–5117, 817 F. 2d 281; No. 87–5139, 115 Ill. 2d 413, 505 N. E. 2d 300; No. 87–5152, 513 Pa. 318, 521 A. 2d 1; No. 87–5203, 503 So. 2d 890; No. 87–5215, 506 So. 2d 1033; No. 87–5258, 116 Ill. 2d 357, 507 N. E. 2d 830; No. 87–5268, 736 P. 2d 161.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 86–6809. MABRY ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 809 F. 2d 671.

No. 87–40. ALLSTATE INSURANCE CO. *v.* HAWKINS ET UX. Sup. Ct. Ariz. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 152 Ariz. 490, 733 P. 2d 1073.

No. 86–6923. BROWN *v.* DODD, SHERIFF. Sup. Ct. Ga. Certiorari denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

I continue to believe that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. See *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). But even if I did not hold this view, I would grant the petition for writ of certiorari in order to consider whether a defendant evaluated for competency by a state-appointed examiner has a due process right to an examiner whose qualifications and procedures meet minimal professional standards. The trial court failed to consider this question, and its conclusory order raises doubt as to whether the strictures of due process were met in this case.

I

Petitioner James Willie Brown has a 20-year history of severe mental illness. When he was arrested for murder in 1975, petitioner already had been institutionalized on three prior occasions. Over the next six years, petitioner was continually adjudged incompetent to stand trial. Petitioner spent most of that time institutionalized at Central State Hospital, where he was consistently diagnosed as a paranoid schizophrenic. In 1977, the hospital reported that petitioner was competent to stand trial, but petitioner's mental condition deteriorated after he was transferred to the local jail and on the joint motion of the State and his counsel, he was recommitted to Central State as incompetent. Petitioner remained at Central State until 1980, when a hospital doctor again determined petitioner could stand trial. Although petitioner's doctors had noted his history of aggravated illness during periods of incarceration and had recommended that he be kept at the hospital until just before trial, petitioner was jailed until his competency trial in April 1981. During this time, a physician at the jail examined petitioner and once again found him incompetent; petitioner's counsel was never informed of this evaluation.

Petitioner filed a demand for speedy trial early in 1981, and a competency trial was scheduled before a special jury. The morning of trial, the court appointed Lewis Collins to evaluate petitioner's competency. Collins had received his Ph.D. from the Georgia State University only 10 days before. He was not a licensed psychologist, and in fact later failed the state licensing examination twice. He had received no formal training in conducting competency evaluations. Collins' entire evaluation of petitioner's competency consisted of one 20-minute interview. Collins did not talk to any of the doctors who previously had examined petitioner, he performed no psychological testing, and the only record he examined was a short discharge summary from Central State. From this meager examination, Collins concluded that petitioner was competent to stand trial. The jury agreed, and three months later petitioner was tried and convicted of murder and sentenced to death.

At the instant state habeas proceeding, a number of experts testified that Collins' qualifications and examination for competency were substandard. The trial court nevertheless determined without explanation that Collins "was qualified by his education and experience to give an opinion as to the sanity of the Peti-

tioner." App. to Pet. for Cert. B–2. The court therefore concluded that "[t]he jury properly found the Petitioner competent to stand trial based upon the evidence before it." *Ibid.* The Supreme Court of Georgia then denied petitioner's application for a certificate of probable cause to appeal.

II

In *Ake* v. *Oklahoma*, 470 U. S. 68, 83 (1985), this Court held that "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." The guarantee recognized in *Ake*, it is important to stress, is not just that the State ensure access to a psychiatrist, but that it ensure that the psychiatrist be a *competent* professional who will perform an *appropriate* examination. Similarly, our cases interpreting the constitutional guarantee of counsel have recognized that that guarantee comprehends a degree of competence; thus, a State cannot discharge its duty to provide counsel by appointing an attorney who fails to render adequate legal assistance. *Strickland* v. *Washington*, 466 U. S. 668, 685–686 (1984). See *Evitts* v. *Lucey*, 469 U. S. 387, 396 (1985) ("[N]ominal representation on an appeal as of right—like nominal representation at trial—does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better postition than one who has no counsel at all").

The instant case calls upon the Court to determine whether an expert appointed by the State to evaluate a defendant's competency to stand trial must meet similar minimum standards. Although we have never confronted the issue directly, I have no doubt that the Due Process Clause incorporates such a safeguard. We already have recognized that "the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." *Drope* v. *Missouri*, 420 U. S. 162, 172 (1975). An examination that meets minimum professional standards performed by a competent psychologist or psychiatrist must count among these adequate procedures. Expert testimony is the most compelling evidence offered to a jury charged

with the task of evaluating a defendant's competency to stand trial. As we have recognized in the context of an evaluation of sanity, "[w]hen jurors make this determination about issues that inevitably are complex and foreign, the testimony of psychiatrists can be crucial . . . ." *Ake* v. *Oklahoma*, *supra*, at 81. Indeed, a defendant subjected to a substandard examination by an unqualified professional may be placed in a worse position than a defendant who is denied an evaluation in the first place. If the "expert" concludes the defendant is competent to stand trial, that conclusion is cloaked in the special authority that we have recognized an expert witness conveys to the jury. See 470 U. S., at 81, n. 7. I therefore believe that when a State appoints an examiner to evaluate a defendant's competency to stand trial, the Constitution requires that the examiner possess minimum professional qualifications and that his examination procedures conform to minimum professional standards.

The trial court apparently did not believe this case raised any constitutional concerns, and it did not consider whether Collins' examination was consistent with the requirements of the Due Process Clause. In my view, there appears to be serious doubt as to whether petitioner's due process rights were met in this case. Collins' qualifications were, at best, undistinguished. Collins, who had received his psychology degree only 10 days before he evaluated petitioner, had never taken Georgia's licensing examination, and he later failed that examination twice. The Chairman of the Board of Examiners of Psychology for the State of Georgia testified at the habeas trial that the licensing examination measures minimum skills and that a person who had failed the test twice might not be qualified to act as a psychologist. Pet. for Cert. 7. Even if Collins were considered qualified to make an evaluation of competency, his examination of petitioner in this case appears to have been hopelessly substandard. Every expert who testified at the habeas trial indicated that Collins' examination was deficient. Collins performed no psychological tests, consulted none of the doctors who previously had examined petitioner, and did not even bother to read most of petitioner's file. This approach is especially suspect in light of petitioner's long history of mental illness and 6-year history of incompetency. I would grant the petition for certiorari to consider whether this treatment can be squared with the due process right not to be tried or convicted while incompetent to stand trial.

October 5, 1987 484 U. S.

No. 86-7054. JOHNSON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 731 P. 2d 993.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would vacate the judgment of the Oklahoma Court of Criminal Appeals insofar as it left undisturbed the death sentence imposed in this case. But even if I did not hold this view, I would grant this petition for certiorari for two reasons. First, the trial court incorrectly decided an unsettled question of law concerning an accused's right to the assistance of experts in preparing his defense. Second, the trial court's instructions at the sentencing hearing, in combination with the prosecutor's closing argument, deprived petitioner of his right to have the sentencing jury consider all of the mitigating evidence he offered.

I

Petitioner Malcolm Johnson was charged with the first-degree murder of Ura Thompson, an elderly woman who had been raped and suffocated in her apartment. Recognizing that the prosecution's case against petitioner rested largely on the opinion of a police chemist, who would testify that petitioner's hair, blood, semen, and clothing were consistent with physical evidence found in Thompson's apartment, petitioner's counsel requested the court prior to trial to appoint a chemist to aid in petitioner's defense. Counsel argued that a chemist was needed to challenge the police chemist's qualifications and testimony and to conduct an electrophoresis test, which even the prosecution conceded could show that petitioner was not the perpetrator of the crime. The trial court agreed with counsel that the appointment of a chemist was warranted, but denied the request on the ground that the Oklahoma Court of Criminal Appeals previously had rejected the view that criminal defendants were entitled to the assistance of such experts. Brief in Opposition 8.

At trial, the prosecution presented two kinds of evidence. First, the prosecution offered evidence showing that petitioner had in his possession at the time of his arrest several items missing from Thompson's apartment. Second, the prosecution pre-

sented the testimony of the police chemist. The prosecutor referred to the chemist's testimony as the "real crux" of the State's case against petitioner. *Id.*, at 15. The jury convicted petitioner of first-degree murder.

During a separate sentencing proceeding, defense counsel offered mitigating evidence relating to petitioner's personal background. Witnesses testifying on behalf of petitioner stated, for example, that petitioner's father frequently had beaten petitioner and his mother, that petitioner's parents eventually had separated, that petitioner had grown up in poverty, and that petitioner as a youngster had suffered from a mysterious and debilitating illness requiring a long hospital stay. Immediately after defense counsel offered this evidence, the trial court instructed the jury. As part of the charge, the trial court stated: "[Y]ou should not allow sympathy, sentiment or prejudice to affect you in reaching your decision. You should avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence." *Id.*, at 19. After the delivery of these instructions, the prosecutor gave his closing argument, in which he ridiculed the mitigating evidence that petitioner's counsel had offered. The prosecutor stated:

> "I've got great empathy for his folks. But so what? . . . [H]is parents divorced when he was young. Oh, wow. . . . That's a mitigating factor for violent conduct. That's bologna *[sic]*. . . . Deprivation builds character. We ought to have fewer silver spoons in the mouths of our children and a little more deprivation. He wants to use that as a mitigating circumstance. . . . I was offended by what happened in this courtroom when the little children were placed on the witness stand to try to generate sympathy for a cold-blooded killer. . . . So what if he was sick or retarded: What's that got to do with—we're dealing with what he is today. . . . Not whether he had a disease when he was a baby, not whether he was mildly retarded at some time in his life." *Id.*, at 20–21.

At the close of the sentencing hearing, the jury recommended a sentence of death, and the court imposed that sentence.

II

This Court long has acknowledged that when a State brings criminal proceedings against an indigent defendant, it must take

steps to ensure that the accused has a meaningful opportunity to present a defense. See, *e. g.*, *Douglas* v. *California*, 372 U. S. 353 (1963); *Griffin* v. *Illinois*, 351 U. S. 12 (1956). Although the State need not purchase for an indigent defendant all of the services that the wealthy may buy, see *Ross* v. *Moffitt*, 417 U. S. 600, 616 (1974), the State must provide the defendant with the "basic tools of an adequate defense," *Britt* v. *North Carolina*, 404 U. S. 226, 227 (1971). We recently have begun to confront the questions whether and when expert assistance is such a basic tool. In *Ake* v. *Oklahoma*, 470 U. S. 68, 80 (1985), we recognized that when a defendant's mental condition is at issue, the assistance of a psychiatrist is "crucial to the defendant's ability to marshal his defense" and the State must therefore provide psychiatric assistance. A few months later, in *Caldwell* v. *Mississippi*, 472 U. S. 320, 323, n. 1 (1985), we reserved the equally important questions whether and when an indigent defendant is entitled to nonpsychiatric expert assistance. This case demonstrates the pressing need to consider and resolve those questions.

The denial of petitioner's request for the appointment of an expert chemist resulted in a fundamentally unfair trial in two respects. First, the denial prevented petitioner from raising doubts about the strength of the State's evidence against him. The prosecution's case against petitioner rested largely on the testimony of the police chemist that petitioner's bodily fluids, hair, and clothing comported with samples found at the scene of the crime. We previously have recognized that "'[t]estimony emanating from the depth and scope of specialized knowledge is very impressive to a jury.'" *Ake* v. *Oklahoma*, *supra*, at 81, n. 7 (quoting F. Bailey & H. Rothblatt, Investigation and Preparation of Criminal Cases § 175 (1970)). Without expert assistance, a defendant will usually be powerless to create doubts in the jury's mind about such testimony's strength or correctness. As Justice (then Chief Judge) Cardozo once stated, a defendant is "at an unfair disadvantage if he is unable because of poverty to parry by his own [expert] witnesses the thrusts of those against him." *Reilly* v. *Berry*, 250 N. Y. 456, 461, 166 N. E. 165, 167 (1929). Petitioner here was at such a disadvantage with respect to testimony that the prosecutor termed the "real crux" of the State's case. Second and equally important, the denial of the request for expert assistance prevented petitioner from gaining potentially conclusive exculpatory evidence in support of his affirmative alibi defense. As petition-

er's counsel explained to the trial court, petitioner desired expert assistance partly because he wanted to undergo a test that could have conclusively disproved his commission of the crime. In *Little* v. *Streater*, 452 U. S. 1 (1981), this Court held that a State's refusal to pay for a blood-grouping test in the context of a quasi-criminal proceeding to establish paternity violated the requirements of due process. Yet the trial court here effectively prevented an accused charged with a capital offense from gaining access to a similar kind of test. By denying petitioner the chance to obtain potentially conclusive exculpatory evidence, as well as by denying him the means to challenge the testimony of the police witness, the rejection of the request for expert assistance deprived petitioner of a meaningful opportunity to present a defense.

III

In *California* v. *Brown*, 479 U. S. 538 (1987), this Court upheld a jury instruction cautioning jurors that they "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" during the penalty phase of a capital murder trial. In holding that the instruction did not suggest to the jury that it should disregard sympathetic aspects of the accused's background or character, the Court argued primarily that by cautioning the jury not to rely on "*mere* sympathy," the instruction directed the jury to ignore "only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase." *Id.*, at 542. In a concurring opinion, JUSTICE O'CONNOR stated that although this jury instruction, taken alone, was constitutional, courts must recognize and guard against the possibility that instructions "attempt[ing] to remove emotion from capital sentencing," especially when combined with certain kinds of prosecutorial remarks, will mislead juries into thinking that they should ignore mitigating evidence about a defendant's background or character. *Id.*, at 545–546. I continue to believe that any instruction forbidding the sentencer to take sympathy into account "precludes precisely the response that a defendant's evidence of character and background is designed to elicit, thus effectively negating the intended effect of the Court's requirement that all mitigating evidence be considered." *Id.*, at 548 (BRENNAN, J., dissenting). But even under the majority's view in *Brown*, the instruction in this case, when considered in conjunction with the prosecutor's comments, diverted the jury from its

constitutional duty to consider all mitigating evidence introduced by the defendant at the sentencing phase of the trial.

The problem in this case arises both from the trial court's instruction to the jury and from the prosecutor's closing argument. The instruction cautioned the jury to disregard not "*mere* sympathy," but "sympathy" in general, which surely includes the sympathy deriving from petitioner's mitigating evidence. The prosecutor's closing argument emphatically endorsed the suggestion that the jury should disregard the mitigating evidence petitioner had offered. By consistently ridiculing the evidence relating to petitioner's background—by saying time and again "so what?"—the prosecutor indicated that such evidence was irrelevant to the sentencing determination. Thus, the conjunction of the court's antisympathy instruction and the prosecutor's closing argument diverted the jury from considering the factors of background and character that this Court has decreed a jury *must* take into account in reaching a sentencing determination.

IV

The handling of this case almost ensured that petitioner would not prevail at either the guilt phase or the sentencing phase of his trial. The denial of the request for expert assistance deprived petitioner of a meaningful opportunity to contest his guilt. The court's antisympathy instruction and the prosecutor's closing argument denied petitioner a fair chance to challenge the appropriateness of the death penalty. Because I believe that the trial court unconstitutionally stacked the deck against petitioner at both stages of this capital proceeding, I would grant the petition for certiorari.

No. 86–7066. MUEHLEMAN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 503 So. 2d 310.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth

and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would vacate the judgment of the Florida Supreme Court insofar as it left undisturbed the sentence of death imposed in this case. But even if I did not hold this view, I would grant this petition for writ of certiorari in order to clarify the relationship between several recent precedents of this Court. Our opinions in *United States* v. *Henry*, 447 U. S. 264 (1980), *Maine* v. *Moulton*, 474 U. S. 159 (1985), and *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986), all examined the circumstances in which the police may, consistent with the Sixth Amendment, obtain incriminating statements from an accused through an informant. We found Sixth Amendment violations in *Henry* and *Maine*, but not in *Kuhlmann*, relying on the slightly different factual circumstances of the cases. These divergent rulings create a potential for misunderstanding when other courts seek to interpret them, as the Florida Supreme Court's opinion in this case demonstrates. We should grant certiorari to resolve the uncertainty created by our own holdings.

I

On May 2, 1983, 96-year-old Earl Baughman hired petitioner, 18-year-old Jeffrey Allen Muehleman, as a "helper." On May 4, petitioner took Baughman to the bank to cash his Social Security check. On May 5, Baughman and his 1961 Cadillac were reported missing. The following day, sheriff's deputies of Pinellas County, Florida, detained petitioner to ask him about the disappearance. Petitioner told a deputy that his name was "Ed Buchanan." He was then arrested for obstructing justice by giving false information, an offense later declared unconstitutional by the Florida Supreme Court in *Bunnell* v. *State*, 453 So. 2d 808 (1984). Petitioner waived his *Miranda* rights and gave a statement that included his true name and a confession to taking some small items without Baughman's permission. Petitioner denied, however, any involvement in Baughman's disappearance. After Baughman's body was found in the trunk of his Cadillac on a St. Petersburg, Florida, street, the police again interviewed petitioner at the maximum-security county jail facility where he was being held. Petitioner continued to deny any involvement in Baughman's death.

While he was in the Pinellas County Jail, petitioner came into contact with Ronald Rewis, who was awaiting sentence on a fel-

ony conviction. According to Rewis, petitioner confessed in detail to the murder of Baughman during unsolicited conversations with Rewis in the jail laundry where both inmates worked. Rewis, who had provided information to correctional officials on at least two previous occasions, then contacted a correctional official who put him in touch with the detectives investigating Baughman's disappearance and death. The detectives told Rewis to let them know if petitioner said anything else and persuaded him to wear a wire to get a tape of petitioner's confession. Rewis then taped a conversation with petitioner in the recreation yard. On the tape, Rewis asked petitioner why he did not merely take the old man's money, to which petitioner responded that he had planned all along to kill the man. Pet. for Cert. 8. When Rewis asked petitioner whether the killing bothered him, petitioner responded "no" and laughed. *Ibid.* Although Rewis was not paid for his cooperation with the investigation, one of the detectives agreed to appear at Rewis' sentencing hearing, at which he received a much lighter sentence than that recommended by the prosecutor.

The detectives, tape in hand, interviewed petitioner again. Petitioner initially continued to deny his involvement with the crime, but when confronted with the evidence against him, including the statements taped by Rewis, petitioner admitted killing Baughman and gave a detailed statement. The detectives then booked petitioner on charges of first-degree murder.

Petitioner filed a pretrial motion to suppress his statements to Rewis and his subsequent confession. When his suppression motion was denied, petitioner entered a plea of guilty. At a penalty trial before a jury, petitioner continued to object to the admission of Rewis' testimony and the tape Rewis had made. During closing argument, the prosecution played a portion of the tape and argued that petitioner's laughter when asked about the murder supported imposition of the death penalty. By a vote of 10 to 2, the jury recommended that petitioner be sentenced to death, and the trial court so sentenced him. On appeal, petitioner raised a host of challenges to his conviction and sentence, all of which were rejected by the Florida Supreme Court. 503 So. 2d 310 (1987). In his petition for a writ of certiorari, petitioner focuses solely on the government's use of Rewis to obtain incriminating statements from him while he was in jail.

II

We first considered the problem of the inmate informant in *United States* v. *Henry*, 447 U. S. 264 (1980). We held that Henry's right to counsel was violated when the Government used a paid informant's testimony regarding incriminating statements made by Henry while he was jailed awaiting trial. Three factors convinced us that the Government had overstepped the bounds of the Sixth Amendment. First, the informant was paid a contingent fee for information he obtained. Second, Henry was unaware that his confidant was in fact a Government informant. Third, Henry's incarceration imposed psychological pressures that rendered him "particularly susceptible to the ploys of undercover Government agents." *Id.*, at 274. We concluded that "[b]y intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel." *Ibid.*

In *Maine* v. *Moulton*, 474 U. S. 159 (1985), we applied the analysis developed in *Henry* to a situation outside of the jailhouse setting. We held that Moulton's right to counsel was violated when the State made a deal with his codefendant in which the codefendant would surreptitiously record Moulton's statements in return for a favorable plea bargain. The State wired the codefendant when he attended an all-day meeting with Moulton, at Moulton's request, to plan their common defense. We rejected the argument that Moulton's initiation of the meeting exonerated the State from any wrongdoing. We held that "the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." 474 U. S., at 176.

In *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986), decided the same Term as *Moulton*, we returned to the jailhouse setting. Wilson was incarcerated pending trial and placed in a cell with a prisoner who had previously agreed to act as a government informant. The State instructed the informant only to listen to Wilson's comments and not to ask any questions. The informant complied with this directive. We held that the informant in this case played the constitutionally permissible role of a mere "listening post." *Kuhlmann* v. *Wilson*, *supra*, at 456, n. 19. We found that this fact distinguished *Kuhlmann* from *Henry* and *Moulton*, concluding that

"the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." 477 U. S., at 459.

In the instant case, the State of Florida, in opposition to the petition for writ of certiorari, urges that the facts found by the state court demonstrate that this case falls within *Kuhlmann*'s exception to the doctrine enunciated in *Henry* and *Moulton*. The Florida Supreme Court found four facts on which it based its Sixth Amendment holding. First, petitioner was "apparently eager to talk" and initially approached Rewis to discuss the crime with him. Second, Rewis approached the authorities on his own initiative. Third, the authorities instructed Rewis not to question petitioner. Fourth, Rewis was not promised any form of compensation for his cooperation. See 503 So. 2d, at 314.

A careful reading of our precedents, however, demonstrates that these facts do not suffice to shield the government from Sixth Amendment challenge in this case. First, we explicitly rejected in *Moulton* the notion that the defendant's initiation of contact with the informant is relevant to the Sixth Amendment issue. 474 U. S., at 174–176. Second, the fact that Rewis initially approached the authorities is insignificant given that the authorities suggested that he be wired. In *Moulton*, we found it compelling that "the police asked [the informant] to let them put a body wire transmitter on him to record what was said." *Id.*, at 177. Third, the mere fact that Rewis was *instructed* not to ask petitioner questions cannot bring this case into the ambit of *Kuhlmann*, because an identical instruction was given to the informant in *Henry*. See *United States* v. *Henry*, *supra*, at 266. What we found compelling in *Kuhlmann* was not merely that the informant was instructed to remain silent, but that he actually did so. It is undisputed in the instant case that Rewis asked petitioner crucial questions concerning why he had killed Baughman and how he felt about it. Pet. for Cert. 8. Finally, the lack of monetary compensation offered Rewis cannot distinguish this case from our contrary holdings. Although the informant in *Henry* was paid a contingent fee, there is no suggestion that the informant in *Moulton* was offered anything other than a favorable plea bargain. The favorable sentencing treatment afforded Rewis in this case is along much the same lines. In sum, none of the facts found by the Florida court successfully distinguishes this case from *Henry* and *Moulton*. As I read our precedents, *Kuhl-*

mann represents the only exception that we have yet recognized to the prohibition established in *Henry* and *Moulton*, and that exception may be invoked only in cases in which the informant can truly be described as a mere "listening post." This is not such a case.

III

Although I think that the Florida Supreme Court misread our precedents in rejecting petitioner's Sixth Amendment claim, its error is one that is lamentably easy to make. Our precedents in this area involve several factual scenarios that vary only slightly. We have given little guidance on which factual variations are relevant to or dispositive of Sixth Amendment claims. We owe it to law enforcement officials and the courts to establish clearly the line across which constitutional error lies. For that reason, we should grant this petition for certiorari.

No. 86–7075. CRAIG ET AL. *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Cabarrus County, N. C. Certiorari denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

I continue to believe that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). But even if I did not hold this view, I would grant this petition for certiorari because the state courts failed to give proper consideration to a recantation by the prosecution's star witness that throws grave doubt on the propriety of sentencing petitioners to death.

I

A grand jury indicted petitioners Andrew Weddington Craig and Francis Marion Anthony in 1981 for the offenses of first-degree murder, common-law robbery, and robbery with a dangerous weapon. At trial, the prosecution attempted to prove that petitioners and Betty Jean Howie had robbed Seab and Edith Ritch and then had killed Edith Ritch by stabbing her repeatedly. Howie's testimony was the only evidence offered to show that petitioners had participated in the stabbing. Howie stated that she and petitioners had taken turns stabbing Edith Ritch with a pocketknife. This testimony was, at the very least, undermined

by medical testimony that the multiple stab wounds were "very much uniform in depth, range, uniform in angle of penetration and probably uniform forcewise." Pet. for Cert. 6. At the close of trial, petitioners were convicted of all charges and sentenced to death. The Supreme Court of North Carolina affirmed the convictions and sentences. 308 N. C. 446, 302 S. E. 2d 740 (1983). Howie pleaded guilty to murder in the second degree and received a sentence of life imprisonment.

A few months after the North Carolina Supreme Court affirmed petitioners' convictions and sentences, petitioner Anthony received an unsolicited letter from Howie stating that she wanted to "g[o] back to court and tel[l] the truth" about the case. Pet. for Cert. 7. Petitioners immediately filed a joint motion for appropriate relief, and the trial court held a hearing at which Howie testified. In her testimony, Howie stated that she alone had stabbed Edith Ritch, although petitioners had participated in the robbery and remained on the scene during the murder. Howie further testified that she was recanting her trial testimony over the objections of her family and her counsel, who had warned her that the recantation would expose her to further prosecution. Howie explained that "I was trying to live with a lie and no one knows . . . what it has done to me, what it has taken me through." *Id.*, at 8. After listening to Howie's testimony, the trial court denied petitioners' motion for relief. In a cursory decision, the court first found that the recantation testimony was "probably not true" and "in some instances [was] incredible." App. to Pet. for Cert. A–2. The court then stated that even if the recantation were true, it would not change the result of the prior proceedings because the recantation itself showed that petitioners had "attempted to kill, or participated in the killing, or intended it, or contemplated that life may be taken in the commission of the felony robbery." *Id.*, at A–3.

II

The trial court's conclusion that Howie's recantation, if believed, would not change the result of the prior proceedings is insupportable under our case law. That conclusion rests on the view that a sentencer may permissibly impose the death sentence if the defendant "contemplated that life may be taken in the commission" of a felony. In *Tison* v. *Arizona*, 481 U. S. 137 (1987), however, this Court explicitly rejected such a view. We stated that the death penalty is supportable in felony-murder cases only upon a

finding of intent to kill or upon a finding of reckless indifference to human life on the part of a major participant in the felony. *Id.*, at 157–158. The trial court's determination that Howie's recantation would not change the result of the sentencing proceeding thus was premised on an improper view of when the death sentence may constitutionally be imposed. In these circumstances, the determination cannot support the denial of petitioners' requested relief. That denial must rest, if at all, on the court's determination of the credibility of Howie's recantation testimony.

I believe, however, that the court's credibility finding is constitutionally deficient. This Court often has recognized that the stark finality of the death penalty creates an enhanced "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (plurality opinion). In capital cases, we therefore have "invalidated procedural rules that tended to diminish the reliability of the sentencing determination" and have imposed a range of procedural safeguards in their place. *Beck* v. *Alabama*, 447 U. S. 625, 638 (1980). In keeping with this practice, I previously have espoused the view that when a life is hanging in the balance, a court may not reject the recantation of critical testimony without providing a specific explanation of "what it is about that recantation that warrants a conclusion that it is not credible evidence." *Dobbert* v. *Wainwright*, 468 U. S. 1231, 1235–1236 (1984) (BRENNAN, J., dissenting). The lower court in this case failed to give even the semblance of such an explanation. Perhaps because the court believed the credibility determination to be superfluous in light of the court's alternative holding, the court said nothing more than that the recantation was "probably not true" and "in some instances [was] incredible" The denial of petitioners' motion for relief on so slight a basis is inconsistent with the requirement of heightened procedural protections to ensure the reliability of sentencing determinations in capital cases.

III

Only three persons know who stabbed Edith Ritch. Two have insisted for many years that they took no part in the stabbing. The third, whose testimony provided the sole support for the prosecution's theory of the murder, now has confirmed their claim. There may be reasons to discount this recent recantation, but none has yet appeared on the record of this case. I would grant

the petition for certiorari to ensure that petitioners do not go to their deaths before a court has given the requisite explanation.

No. 87–7. MICHELS ET AL. *v.* TIMES MIRROR CABLE TELEVISION OF LOUISVILLE, INC., ET AL. Sup. Ct. Ky. Motion of petitioners to defer consideration of the petition for certiorari denied. Certiorari denied.

No. 87–34. MARCOS ET UX. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 817 F. 2d 1108.

No. 87–188. RANDOM HOUSE, INC., ET AL. *v.* SALINGER. C. A. 2d Cir. Motions of Organization of American Historians, Association of American Publishers, and Kenneth S. Davis et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 811 F. 2d 90 and 818 F. 2d 252.

No. 87–366. AKINS *v.* DISTRICT OF COLUMBIA ET AL. Ct. App. D. C. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 526 A. 2d 933.

No. 87–5066. MORENO *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 153 Ariz. 67, 734 P. 2d 609.

No. 87–5154. WILLIAMS *v.* PLANNED PARENTHOOD ET AL. C. A. 11th Cir. Certiorari before judgment denied.

Rehearing Denied

No. 86–1201. VAHLSING CHRISTINA CORP. *v.* COMMISSIONER OF INTERNAL REVENUE, 481 U. S. 1068; and

No. 86–6768. LUCAS *v.* AIKEN, WARDEN, ET AL., 482 U. S. 931. Petitions for rehearing denied.

Assignment Orders

An order of THE CHIEF JUSTICE designating and assigning Justice Powell (retired) to perform judicial duties in the United States Court of Appeals for the Fourth Circuit during the period of October 5 through October 9, 1987, and for such further time as may be required to complete unfinished business, pursuant to

28 U. S. C. § 294(a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

The order of July 31, 1987 [483 U. S. 1041], assigning THE CHIEF JUSTICE to the Fifth Circuit as Circuit Justice is vacated.

OCTOBER 7, 1987

Dismissal Under Rule 53

No. 87-5224. TRIPATI *v.* UNITED STATES. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 53.

OCTOBER 9, 1987

Miscellaneous Order

No. A-278 (87-5638). BELL *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied by an equally divided Court.

Certiorari Granted

No. 87-5546. FRANKLIN *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 3 presented by the petition. Reported below: 823 F. 2d 98.

Certiorari Denied

No. 87-5359 (A-261). DAUGHERTY *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Certiorari denied. Reported below: 505 So. 2d 1323.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

OCTOBER 13, 1987

Appeals Dismissed

No. 87-137. MORIN *v.* PETRARCA. Appeal from Sup. Ct. R. I. dismissed for want of substantial federal question.

No. 87–265. KIMBERLIN *v.* OKLAHOMA. Appeal from Ct. Crim. App. Okla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 736 P. 2d 530.

No. 87–302. AQUARIAN FOUNDATION ET AL. *v.* LAW OFFICES OF EDWARDS & BARBIERI. Appeal from Ct. App. Wash. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 87–404. MANUEL *v.* HUDGENS ET AL. Appeal from Sup. Ct. Ga. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 257 Ga. XXVII, 356 S. E. 2d 29.

No. 87–5150. BARONOWSKI *v.* THE UNCONSTITUTIONALITY OF TWO SUBSECTIONS OF THE PRIVACY ACT ET AL. Appeal from D. C. E. D. La. dismissed for want of jurisdiction.

Miscellaneous Orders

No. A–176 (87–5508). ALMODOVAR *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–207 (87–405). IN RE YEE. Application for stay and other relief, addressed to JUSTICE SCALIA and referred to the Court, denied.

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. Motion of the United States for leave to file a reply to the Exceptions of Mississippi out of time granted. Exceptions to the Report of the Special Master are set for oral argument in due course. Motion of the Special Master for additional compensation and reimbursement of expenses, as set forth in the motion, is granted, and it is ordered that such costs be borne equally by the United States and Mississippi. JUSTICE MARSHALL took no part in the consideration or decision of these motions. [For earlier order herein, see, *e. g.*, 481 U. S. 1011.]

No. 94, Orig. SOUTH CAROLINA *v.* BAKER, SECRETARY OF THE TREASURY. Motion of South Carolina for divided argument to permit National Governors' Association to present oral argu-

ment as intervenor and motion of National Governors' Association for divided argument granted. Requests for additional time for oral argument denied. [For earlier order herein, see, *e. g.*, *ante*, p. 808.]

No. D–634. IN RE DISBARMENT OF BRYAN. Disbarment entered. [For earlier order herein, see 481 U. S. 1066.]

No. D–639. IN RE DISBARMENT OF GOLDBERG. Disbarment entered. [For earlier order herein, see 482 U. S. 903.]

No. D–655. IN RE DISBARMENT OF WOOD. It is ordered that Roger A. Wood, of Toledo, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–656. IN RE DISBARMENT OF FRIEDMAN. It is ordered that John Albert Friedman, of Fort Lauderdale, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–657. IN RE DISBARMENT OF ROSENTHAL. It is ordered that Jerome Bernard Rosenthal, of Los Angeles, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–658. IN RE DISBARMENT OF ROBINSON. It is ordered that James E. Robinson, of Houston, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 86–492. BOYLE, PERSONAL REPRESENTATIVE OF THE HEIRS AND ESTATE OF BOYLE *v.* UNITED TECHNOLOGIES CORP. C. A. 4th Cir. [Certiorari granted, 479 U. S. 1029.] Motion of Edwin Lees Shaw for leave to submit supplemental authority as *amicus curiae* denied.

No. 86–1172. GOODYEAR ATOMIC CORP. *v.* MILLER ET AL. Sup. Ct. Ohio. [Probable jurisdiction noted, 483 U. S. 1004.] Motion of appellees for divided argument denied.

No. 86–6139. WATSON *v.* FORT WORTH BANK & TRUST. C. A. 5th Cir. [Certiorari granted, 483 U. S. 1004.] Motion of the So-

licitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 87–318. PRATT & WHITNEY AIRCRAFT DIVISION, UNITED TECHNOLOGIES CORP. *v.* BALDRACCHI. C. A. 2d Cir. Motion of Jonna Lingle for leave to file a brief as *amicus curiae* granted.

No. 87–5315. WRENN *v.* BOARD OF DIRECTORS, WHITNEY M. YOUNG, JR., HEALTH CENTER, INC., ET AL. C. A. 2d Cir.; and

No. 87–5353. WRENN *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Motions of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until November 3, 1987, within which to pay the docketing fee required by Rule 45(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petitions for writs of certiorari without reaching the merits of the motions to proceed *in forma pauperis*.

No. 87–291. IN RE CONSTANT. C. A. Fed. Cir. Petition for writ of common-law certiorari denied. Reported below: 827 F. 2d 728.

No. 87–5435. IN RE CALLANAN; and

No. 87–5487. IN RE FRASSETTO. Petitions for writs of habeas corpus denied.

Certiorari Granted

No. 86–1845. TORRES *v.* OAKLAND SCAVENGER CO. ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 807 F. 2d 178.

No. 86–1908. STEWART ORGANIZATION, INC., ET AL. *v.* RICOH CORP. ET AL. C. A. 11th Cir. Certiorari granted. Reported below: 810 F. 2d 1066.

No. 86–2000. UNITED STATES *v.* KOZMINSKI ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 821 F. 2d 1186.

No. 87–6. HUDDLESTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted. Reported below: 811 F. 2d 974.

No. 87–259. LINGLE *v.* NORGE DIVISION OF MAGIC CHEF, INC. C. A. 7th Cir. Certiorari granted. Reported below: 823 F. 2d 1031.

No. 87–283. BUDINICH *v.* BECTON DICKINSON & CO. C. A. 10th Cir. Certiorari granted. Reported below: 807 F. 2d 155.

No. 86–1052. VOLKSWAGENWERK AKTIENGESELLSCHAFT *v.* SCHLUNK, ADMINISTRATOR OF THE ESTATES OF SCHLUNK ET AL. App. Ct. Ill., 1st Dist. Motion of Motor Vehicle Manufacturers Association of the United States, Inc., et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. Reported below: 145 Ill. App. 3d 594, 503 N. E. 2d 1045.

No. 86–1824. MICHIGAN *v.* CHESTERNUT. Ct. App. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 157 Mich. App. 181, 403 N. W. 2d 74.

No. 86–6124. BENNETT *v.* ARKANSAS. Sup. Ct. Ark. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 290 Ark. 47, 716 S. W. 2d 755.

No. 86–7059. PATTERSON *v.* ILLINOIS. Sup. Ct. Ill. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 116 Ill. 2d 290, 507 N. E. 2d 843.

Certiorari Denied. (See also Nos. 87–265, 87–302, 87–404, and 87–291, *supra*.)

No. 86–1847. EDGAR, SECRETARY OF STATE OF ILLINOIS *v.* MCVEY TRUCKING, INC. C. A. 7th Cir. Certiorari denied. Reported below: 812 F. 2d 311.

No. 86–1883. TRIPLE "A" MACHINE SHOP, INC. *v.* SOUTHWEST MARINE, INC. C. A. 9th Cir. Certiorari denied. Reported below: 796 F. 2d 291 and 806 F. 2d 898.

No. 86–1971. COLEMAN *v.* WHITE, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 813 F. 2d 409.

No. 86–1982. HOWE ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 814 F. 2d 98.

No. 86–7151. HOLT *v.* MERIT SYSTEMS PROTECTION BOARD; and

No. 87–5050. HOLT *v.* DEPARTMENT OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 818 F. 2d 877.

No. 87–29. SENAWI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 816 F. 2d 683.

No. 87–76. LEWIS *v.* MYSHAK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 805 F. 2d 1039.

No. 87–79. MCELVEY *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION; and MCCLAIN *v.* DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 802 F. 2d 467 (first case); 802 F. 2d 468 (second case).

No. 87–87. WILLIAMS *v.* UNITED STATES; and

No. 87–5107. SAHS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 809 F. 2d 1072.

No. 87–103. BOULEZ *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. D. C. Cir. Certiorari denied. Reported below: 258 U. S. App. D. C. 90, 810 F. 2d 209.

No. 87–104. BARNSON ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 816 F. 2d 549.

No. 87–119. BOLDEN *v.* ALSTON, SUPERINTENDENT, LINCOLN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 810 F. 2d 353.

No. 87–142. SOUTH AFRICAN AIRWAYS *v.* DOLE, SECRETARY OF TRANSPORTATION. C. A. D. C. Cir. Certiorari denied. Reported below: 260 U. S. App. D. C. 12, 817 F. 2d 119.

No. 87–173. MASSACHUSETTS MEDICAL SOCIETY ET AL. *v.* DUKAKIS ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 815 F. 2d 790.

No. 87–179. TONY SCOTT TRUCKING, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 821 F. 2d 312.

No. 87–193. JOHNSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 152 Ill. App. 3d 559, 504 N. E. 2d 822.

No. 87–208. MIRRER *v.* INHAM, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 833 F. 2d 1003.

No. 87–231. STOVER *v.* JOURNAL PUBLISHING CO. ET AL. Sup. Ct. N. M. Certiorari denied. Reported below: 105 N. M. 290, 731 P. 2d 1334.

No. 87–241. STOBAUGH *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 87–244. MATCHETT *v.* WOLD. C. A. 7th Cir. Certiorari denied. Reported below: 818 F. 2d 574.

No. 87–252. HAMILTON ET AL. *v.* MORRIS COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 812 F. 2d 1403.

No. 87–258. BENEVENTO ET AL. *v.* MOBIL OIL CORP. Ct. App. Cal., 6th App. Dist. Certiorari denied. Reported below: 189 Cal. App. 3d 485, 234 Cal. Rptr. 482.

No. 87–263. MICHIGAN *v.* JOHNSON. Ct. App. Mich. Certiorari denied. Reported below: 146 Mich. App. 705, 381 N. W. 2d 791.

No. 87–264. SOLIS ET AL. *v.* BAY AREA RAPID TRANSIT DISTRICT. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 87–266. MARTELLI *v.* MARTELLI ET AL. Sup. Ct. Pa. Certiorari denied.

No. 87–269. DARBY ET AL. *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 502 So. 2d 1358.

No. 87–274. BUNTON ET AL. *v.* NABISCO BRANDS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 817 F. 2d 754.

No. 87–277. FLORIDA *v.* EBER ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 502 So. 2d 32.

No. 87–278. RAYNOVICH *v.* GREGG ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 70 Md. App. 749.

No. 87–279. BALLINGER *v.* NORTH CAROLINA AGRICULTURAL EXTENSION SERVICE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 815 F. 2d 1001.

No. 87–280. PLUMMER *v.* LEDERLE LABORATORIES, A DIVISION OF AMERICAN CYANAMID CO. C. A. 2d Cir. Certiorari denied. Reported below: 819 F. 2d 349.

No. 87–287. REED *v.* KARPER. Super. Ct. Pa. Certiorari denied. Reported below: 358 Pa. Super. 629, 514 A. 2d 202.

No. 87–293. GAINES ET AL. *v.* WILLIAMS. C. A. 5th Cir. Certiorari denied. Reported below: 819 F. 2d 1140.

No. 87–296. JONES, SUPERINTENDENT, MISSOURI TRAINING CENTER FOR MEN *v.* GARRETT. C. A. 8th Cir. Certiorari denied. Reported below: 815 F. 2d 509.

No. 87–298. SIMPSON *v.* UNITED STATES; and
No. 87–5366. ANDERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 813 F. 2d 1462.

No. 87–300. CAREY CANADA, INC. *v.* HINELY ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 257 Ga. 150, 356 S. E. 2d 202.

No. 87–304. LEIGHTON *v.* BEATRICE COS., INC., ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 522 A. 2d 865.

No. 87–308. TRUSTEES OF THE OFFICE OF HAWAIIAN AFFAIRS *v.* YAMASAKI, DIRECTOR, DEPARTMENT OF TRANSPORTATION OF HAWAII, ET AL. Sup. Ct. Haw. Certiorari denied. Reported below: 69 Haw. 154, 737 P. 2d 446.

No. 87–311. UNIMILLS B. V. ET AL. *v.* STATISTIX SHIPPING, N. V., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 817 F. 2d 345.

No. 87–337. AMARIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 819 F. 2d 1146.

No. 87–350. CIANCAGLINI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 813 F. 2d 399.

No. 87–355. MCMILLAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 820 F. 2d 251.

No. 87–356. COLLEY *v.* NATIONAL BANK OF TEXAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 814 F. 2d 1008.

No. 87–358. BARSHOV ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 823 F. 2d 556.

No. 87–360. JIMENEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 820 F. 2d 1221.

No. 87–384. BELIZAIRE *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 24 M. J. 183.

No. 87–387. HEYDEN *v.* SCHOENFELD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 819 F. 2d 1144.

No. 87–401. GRIMES *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 11th Cir. Certiorari denied. Reported below: 813 F. 2d 410.

No. 87–5103. HERNANDEZ-LOPEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 820 F. 2d 1230.

No. 87–5161. WATSON *v.* BUTLER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 823 F. 2d 842.

No. 87–5173. WAYNO *v.* BOB STEELE CHEVROLET, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 819 F. 2d 1148.

No. 87–5194. CULLY *v.* CUTLIP ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 817 F. 2d 756.

No. 87–5195. CULLY *v.* LUTHERAN MEDICAL CENTER. C. A. 6th Cir. Certiorari denied. Reported below: 817 F. 2d 756.

No. 87–5223. CHESTER *v.* ST. LOUIS HOUSING AUTHORITY. C. A. 8th Cir. Certiorari denied. Reported below: 820 F. 2d 259.

No. 87–5234. BANKS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 87–5241. FLETCHER *v.* HOOD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 825 F. 2d 410.

No. 87–5246. LEFFLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 819 F. 2d 1146.

No. 87–5247. MASTERS ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 815 F. 2d 82.

No. 87–5267. PUZZANGHERA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 820 F. 2d 25.

No. 87–5284. MCDONALD *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 817 F. 2d 759.

No. 87–5288. STEWART *v.* CHRANS. C. A. 7th Cir. Certiorari denied. Reported below: 822 F. 2d 1090.

No. 87–5292. ROBERTS *v.* SARGENT. C. A. 8th Cir. Certiorari denied. Reported below: 822 F. 2d 1095.

No. 87–5294. CHISHOLM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 826 F. 2d 1057.

No. 87–5296. CHAMORRO, AKA HERNANDEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 823 F. 2d 542.

No. 87–5299. BOYER *v.* OSWEGO COUNTY BOARD OF COOPERATIVE EDUCATIONAL SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 812 F. 2d 712.

No. 87–5300. TILLI *v.* SPAZIANI ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 361 Pa. Super. 641, 517 A. 2d 1369.

No. 87–5301. STEPHENS *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 686 S. W. 2d 503.

No. 87–5307. JOHNSON *v.* DIXON, JUDGE, DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 87–5310. TROCHE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 800 F. 2d 1141.

No. 87–5312. CHAMBERS *v.* ARMSTRONG BLUM MANUFACTURING CO. C. A. 7th Cir. Certiorari denied. Reported below: 818 F. 2d 32.

No. 87–5313. ZULU, AKA ROBINSON *v.* BUTLER, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 820 F. 2d 1222.

No. 87–5314. HARRIS *v.* VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 820 F. 2d 1219.

No. 87–5318. HADDIX *v.* CITY OF DAYTON, OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 821 F. 2d 649.

No. 87–5322. QUINN *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied. Reported below: 819 F. 2d 1135.

No. 87–5325. ZENO *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 87–5328. LINDH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 820 F. 2d 1220.

No. 87–5331. FIGUEROA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 823 F. 2d 551.

No. 87–5332. BENTLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 825 F. 2d 1104.

No. 87–5333. DUNCAN *v.* ALABAMA. C. A. 11th Cir. Certiorari denied. Reported below: 819 F. 2d 1148.

No. 87–5334. SMITH *v.* FAIRMAN, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 822 F. 2d 1091.

No. 87–5336. WILSON *v.* FOTI, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 819 F. 2d 1140.

No. 87–5337. BENNETT *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 791 F. 2d 917.

No. 87–5338. CHRAPPA *v.* KEMP, SUPERINTENDENT, ADULT DIAGNOSTIC AND TREATMENT CENTER, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 819 F. 2d 1132.

No. 87–5340. PROPHET *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 822 F. 2d 57.

No. 87–5341. MUNOZ *v.* WYOMING. Dist. Ct. Freemont County, Wyo. Certiorari denied.

No. 87–5343. DOE *v.* APPEALS COURT OF MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 23 Mass. App. 1107, 503 N. E. 2d 479.

No. 87–5345. BEHR *v.* TOWNE ASSOCIATES ET AL. C. A. 2d Cir. Certiorari denied.

No. 87–5346. BROOKTER *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied.

No. 87–5347. PAYNE *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 3d Cir. Certiorari denied. Reported below: 810 F. 2d 1164.

No. 87–5348. PLEBAN *v.* JONES, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 87–5349. MURRAY *v.* PLAUT, ADMINISTRATOR, MAXIMUM SECURITY FACILITY, LORTON, VIRGINIA. C. A. D. C. Cir. Certiorari denied.

No. 87–5352. ALI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 822 F. 2d 57.

No. 87–5370. EVANS *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 24 M. J. 344.

No. 87–5384. GREEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 820 F. 2d 1228.

No. 87–5392. POWELL *v.* DALTUVA ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 820 F. 2d 405.

No. 87–5405. MCEVOY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 820 F. 2d 1170.

No. 87–5406. HILL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 824 F. 2d 973.

No. 87–5415. VANDESTEEG ET AL. *v.* UNITED STATES; and
No. 87–5422. VALDEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 823 F. 2d 549.

No. 87–5416. DIANA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 823 F. 2d 556.

No. 87–5421. BATTLE *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 824 F. 2d 971.

No. 87–5426. SCHASTOK *v.* TIME INC. C. A. 2d Cir. Certiorari denied. Reported below: 816 F. 2d 670.

No. 87–5429. FRYBERGER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 822 F. 2d 1089.

No. 87–5430. APODACA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 820 F. 2d 348.

No. 87–5438. TINDER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 825 F. 2d 408.

No. 87–5455. SMITH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 87–5457. SWIATEK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 819 F. 2d 721.

No. 87–5459. ROVETUSO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 840 F. 2d 363.

No. 87–5467. FALAQ *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 70 N. Y. 2d 646, 512 N. E. 2d 564.

No. 87–5476. DEMPEWOLF *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 817 F. 2d 1318.

No. 87–5483. DAME *v.* MUNCY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 828 F. 2d 17.

No. 86–6884. WELCH *v.* SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir.; and

No. 86–7132. MILLER *v.* SIMMONS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: No. 86–6884, 810 F. 2d 40; No. 86–7132, 814 F. 2d 962.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

The issue here is whether an order denying a civil rights plaintiff's motion for appointment of counsel is immediately appealable under 28 U. S. C. § 1291, as interpreted by *Cohen* v. *Beneficial Industrial Loan Co.*, 337 U. S. 541 (1949), and its progeny. In both of these cases petitioners brought their actions under 42 U. S. C. § 1983, and sought appointment of counsel under 28 U. S. C. § 1915(d). The District Courts denied those motions and petitioners appealed. In *Welch* v. *Smith*, although stating that if the question were before the court "as one of first impression, we would find it of considerable intricacy, in light of the weighty competing interests involved and the varying resolutions of our sister

circuits," 810 F. 2d 40, 41 (1987), a panel of the Second Circuit held that the denial was not immediately appealable under its earlier decision in *Miller* v. *Pleasure*, 425 F. 2d 1205, cert. denied, 400 U. S. 880 (1970), which itself had overruled an even earlier decision concluding the opposite, *Miller* v. *Pleasure*, 296 F. 2d 283 (1961), cert. denied, 370 U. S. 964 (1962). The position of the Second and Fourth Circuits, which is consistent with that of a number of the Circuits, conflicts with the position of two other Circuits. *Jackson* v. *Dallas Police Dept.*, 811 F. 2d 260 (CA5 1986) *(per curiam)*; *Slaughter* v. *Maplewood*, 731 F. 2d 587 (CA8 1984). The confusion in this area is further exemplified by the Ninth Circuit's position that civil rights plaintiffs proceeding under Title VII of the Civil Rights Act of 1964 may immediately appeal a denial of their motion for appointment of counsel, while those proceeding under § 1983 may not. Compare *Wilborn* v. *Escalderon*, 789 F. 2d 1328 (1986), with *Bradshaw* v. *Zoological Society of San Diego*, 662 F. 2d 1301 (1981). I have previously dissented from denial of certiorari in a case raising this question in the context of suits filed under Title VII and § 1983, *Henry* v. *Detroit Manpower Dept.*, 474 U. S. 1036 (1985). The continued split amongst the Circuits on this issue warrants our granting certiorari.

No. 86-6914. MOORE *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 181 Ga. App. 548, 352 S. E. 2d 821.

JUSTICE WHITE, dissenting.

In *Scott* v. *Illinois*, 440 U. S. 367 (1979), this Court held that an uncounseled misdemeanor conviction is constitutionally valid if the offender is not incarcerated. The following Term, however, in *Baldasar* v. *Illinois*, 446 U. S. 222 (1980) *(per curiam)*, this Court held that such a conviction may not be used under an enhanced penalty statute to convert a subsequent misdemeanor conviction into a felony with a prison term.

Here, petitioner was convicted and sentenced to a prison term under Ga. Code Ann. § 40-6-391(C) (Supp. 1987) which imposes a mandatory minimum sentence on a person convicted of driving under the influence of alcohol, where such person has at least two prior convictions for the same offense. Petitioner argued that *Baldasar* prohibited her conviction under § 40-6-391(C), because this conviction relied upon her two prior, uncounseled convictions for driving under the influence. The Court of Appeals of Georgia

rejected this contention, and determined that *Baldasar* was inapplicable here because § 40–6–391(C) merely imposes a *minimum* prison term based on petitioner's prior convictions, and does not "increas[e] the *maximum* confinement authorized [or] conver[t] a misdemeanor offense into a felony." 181 Ga. App. 548, 549, 352 S. E. 2d 821, 822 (1987) (emphasis added).

Possibly because this Court was sharply divided in *Baldasar*, with no opinion for reversal gaining more than three votes, courts attempting to apply that decision have come to different conclusions concerning its meaning. See *Schindler* v. *Clerk of Circuit Court*, 715 F. 2d 341, 344 (CA7 1983) ("In light of . . . the failure of the *Baldasar* majority to agree upon a rationale for its result, the scope of the decision remains unclear"), cert denied, 465 U. S. 1068 (1984). Some courts have applied *Baldasar* as the Georgia court did here, and have allowed the use of prior, uncounseled convictions in cases quite similar to this one. *E. g.*, *Commonwealth* v. *Thomas*, 510 Pa. 106, 112–114, 507 A. 2d 57, 60–61 (1986); *State* v. *Orr*, 375 N. W. 2d 171, 175–176 (N. D. 1985). Others, however, have read *Baldasar* more broadly, and have disallowed the use of prior, uncounseled convictions in prosecutions akin to petitioner's. *E. g.*, *State* v. *Oehm*, 9 Kan. App. 2d 399, 401–403, 680 P. 2d 309, 311–312 (1984); *State* v. *Dowd*, 478 A. 2d 671, 677–678 (Me. 1984).

Because the confusion over *Baldasar*'s holding has led to uneven application of that case and conflicting decisions in the courts below, I would grant certiorari here to answer the outstanding questions concerning *Baldasar*'s scope and proper application.

No. 86–7162. JOUBERT *v.* NEBRASKA. Sup. Ct. Neb.;

No. 87–5048. HALL *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir.;

No. 87–5082. HORTON *v.* GEORGIA. Sup. Ct. Ga.;

No. 87–5083. GARDNER *v.* TEXAS. Ct. Crim. App. Tex.; and

No. 87–5360. DUREN *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: No. 86–7162, 224 Neb. 411, 399 N. W. 2d 237; No. 87–5048, 805 F. 2d 945; No. 87–5083, 730 S. W. 2d 675; No. 87–5360, 507 So. 2d 121.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153,

227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 87–32. MOREY ET UX. *v.* BARRINGTON PRESS, INC. C. A. 7th Cir. Certiorari denied. Reported below: 816 F. 2d 341.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

In *White* v. *New Hampshire Dept. of Employment Security*, 455 U. S. 445, 451 (1982), we held that a claim "for attorney's fees under 42 U. S. C. § 1988 raises legal issues collateral to the main cause of action," and that such a request was not a motion to alter or amend a judgment under Federal Rule of Civil Procedure 59(e). In the years that have followed, we have not determined if *White*'s holding applies only to fee requests under a separate statutory provision like § 1988, or if it also renders "collateral" those fee requests made in cases where the fee award arises as an integral part of the underlying dispute between the parties.

Consequently, several questions concerning the finality (and, as a result, the appealability) of judgments encompassing fee awards in cases of the latter type have been the subject of confusion in the Courts of Appeals. This case raises such a question. Here, respondent prevailed in its action seeking judgment on four promissory notes executed by petitioners. The District Court awarded respondent principal and interest "plus reasonable attorney's fees incurred" by respondent. App to Pet. for Cert. D–7. The District Court did not fix an amount for the attorney's fees at that time. The Court of Appeals affirmed the judgment below; it mentioned, but did not specifically review, the District Court's award of attorney's fees. 752 F. 2d 307, 308 (CA7 1985). On respondent's subsequent petition for fees, however, the District Court entertained petitioners' Illinois law challenge to the fee award, and determined that Illinois law prohibited a fee award in this case. 635 F. Supp. 1257 (ND Ill. 1986). The Court of Appeals reversed this decision, finding that "reservation of the determination of the amount of attorney's fees does not deprive the initial [district court] judgment of finality," and therefore the District Court could not reconsider respondent's entitlement to fees in its second decision. 816 F. 2d 341, 342 (CA7 1987).

The Courts of Appeals are sharply divided over the question presented here: whether an award of attorney's fees, when it arises out of a claimant's underlying cause of action, is final before that award is quantified. See *Beckwith Machinery Co.* v. *Travelers Indem-*

nity Co., 815 F. 2d 286, 288–289 (CA3 1987) (canvassing the Courts of Appeals decisions). Four Circuits have held that an attorney's fee award, when that award is not won in a collateral proceeding (such as a § 1988 action), is not final until the amount of the award is quantified. *Beckwith Machinery Co., supra*, at 290; *F. H. Krear & Co.* v. *Nineteen Named Trustees*, 776 F. 2d 1563, 1564 (CA2 1985); *Todd Shipyards Corp.* v. *Auto Transportation, S. A.*, 763 F. 2d 745, 751 (CA5 1985); *Fort* v. *Roadway Express, Inc.*, 746 F. 2d 744, 747 (CA11 1984). Two other Courts of Appeals have taken the approach applied by the Seventh Circuit here, according finality to all attorney's fees awards prior to their quantification. *Budinich* v. *Becton Dickinson & Co.*, 807 F. 2d 155, 157–158 (CA10 1986); *Morgan* v. *Union Metal Mfg.*, 757 F. 2d 792, 794–796 (CA6 1985). At least one other Court of Appeals has recognized the split, but has declined to take a position. *Crossman* v. *Maccoccio*, 792 F. 2d 1, 3 (CA1 1986) *(per curiam)*.

Because the Courts of Appeals have divided in their attempt to apply the principles of our decision in *White*, I would grant certiorari in this case to resolve the conflict and answer the question presented here.

No. 87–129. ST. LOUIS SOUTHWESTERN RAILWAY CO. *v.* BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES. C. A. 5th Cir. Certiorari denied. Reported below: 820 F. 2d 1222.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

This case presents the question whether under the Railway Labor Act an arbitrator exceeds the scope of his or her jurisdiction by awarding, without explicit authorization in the collective-bargaining agreement, pure penalty pay. See 45 U. S. C. § 153, First (q). "Pure penalty pay" is a monetary penalty assessed for breach of the collective-bargaining agreement when there is no showing of compensatory loss from the breach. In the present case, the arbitrator found that petitioner violated the collective-bargaining agreement by contracting out work to nonunion members. The arbitrator also found that the named union employees failed to prove damages to support a compensatory award and that no provision of the agreement explicitly authorized the award of penalty pay but that penalty pay was supported by past practices in the railroad industry and of these parties. The District Court affirmed this award of pure penalty pay and the Fifth Circuit af-

firmed that decision in an unpublished memorandum. Judgt. order reported at 820 F. 2d 1222 (1987). This case conflicts with *Norfolk & Western R. Co.* v. *Brotherhood of Railway, Airline & Steamship Clerks*, 657 F. 2d 596 (CA4 1981), which held that pure penalty pay cannot be awarded, absent explicit contractual authorization. I would grant certiorari to resolve the conflict in the Courts of Appeals over this important question of federal law, particularly since these rulings could easily result in the same collective-bargaining contract, or identical ones, being interpreted in different ways in different circuits.

No. 87-256. CHRISTENSEN ET AL. *v.* KIEWIT-MURDOCK INVESTMENT CORP. ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 815 F. 2d 206.

No. 87-261. PACIFIC GAS & ELECTRIC CO. *v.* TELLEZ. C. A. 9th Cir. Motion of California Employment Law Council et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 817 F. 2d 536.

No. 87-284. TEXAS *v.* BROADWAY. Ct. Crim. App. Tex. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 87-5409. MARTIN *v.* PENNSYLVANIA STATE REAL ESTATE COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition.

OCTOBER 14, 1987

Miscellaneous Order

No. A-288. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. *v.* DAUGHERTY. Application of the Attorney General of Florida for an order to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eleventh Circuit, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied.

OCTOBER 19, 1987

Appeals Dismissed

No. 87-307. KONDOR *v.* PENNSYLVANIA. Appeal from Super. Ct. Pa. dismissed for want of substantial federal question. Reported below: 357 Pa. Super. 636, 513 A. 2d 1076.

No. 87–314. QUALITY MARKETS, INC. *v.* PENNSYLVANIA. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 514 Pa. 586, 526 A. 2d 357.

No. 87–345. IN RE ASAM. Appeal from C. A. 11th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari and the petition for writ of mandamus denied.

No. 87–390. IN RE ASAM. Appeal from C. A. 11th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari and the petition for writ of mandamus denied.

No. 87–398. RUSS BUILDING PARTNERSHIP *v.* CITY AND COUNTY OF SAN FRANCISCO ET AL. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of jurisdiction. Reported below: 188 Cal. App. 3d 977, 234 Cal. Rptr. 1.

No. 87–5378. ANDREGG *v.* PACIFIC TELEPHONE & TELEGRAPH CO. ET AL. Appeal from Ct. App. Cal., 3d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 87–5439. DEHNHOFF *v.* VINYARD ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 818 F. 2d 868.

Certiorari Granted—Vacated and Remanded

No. 87–146. SMITH BARNEY, HARRIS UPHAM & CO., INC., ET AL. *v.* ADRIAN ET UX. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220 (1987). Reported below: 815 F. 2d 655.

No. 87–169. SCULLY ET AL. *v.* FROMER. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *O'Lone* v. *Estate of Shabazz*, 482 U. S. 342 (1987), and *Turner* v. *Safley*, 482 U. S. 78 (1987). Reported below: 817 F. 2d 227.

Certiorari Granted—Reversed. (See No. 87–75, *ante*, p. 3.)

Miscellaneous Orders

No. A–265. LORENZINI ET UX. *v.* NEW JERSEY ET AL. Super. Ct. N. J., App. Div. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. A–270 (87–544). COOMBE, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY *v.* ESCALERA. C. A. 2d Cir. Application of Robert Escalera for bail, presented to JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A–284. ROSENTHAL *v.* STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Application for stay and other relief, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D–651. IN RE DISBARMENT OF RIGOLOSI, 483 U. S. 1051. Motion to defer filing a response to the rule to show cause denied.

No. 105, Orig. KANSAS *v.* COLORADO. It is ordered that Arthur L. Littleworth, Esq., of Riverside, Cal., be appointed Special Master in place of the Honorable Wade H. McCree, Jr., deceased.

The Special Master shall have authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Special Master is directed to submit such reports as he may deem appropriate.

The compensation of the Special Master, the allowances to him, the compensation paid to his legal, technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses, including travel expenses, shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct. [For earlier order herein, see, *e. g.*, 478 U. S. 1018.]

No. 86–181. DIXON *v.* WESTINGHOUSE ELECTRIC CORP. C. A. 4th Cir. Motion of the Solicitor General for leave to file a supplemental brief as *amicus curiae* granted.

No. 86–728. HONIG, CALIFORNIA SUPERINTENDENT OF PUBLIC INSTRUCTION *v.* DOE ET AL. C. A. 9th Cir. [Certiorari granted, 479 U. S. 1084.] Motion of the Solicitor General to per-

mit Glen D. Nager, Esq., to present oral argument *pro hac vice* granted.

No. 86–1512. PIERCE, SECRETARY OF HOUSING AND URBAN DEVELOPMENT *v.* UNDERWOOD ET AL. C. A. 9th Cir. [Certiorari granted, 481 U. S. 1047.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 86–1602. UNITED SAVINGS ASSOCIATION OF TEXAS *v.* TIMBERS OF INWOOD FOREST ASSOCIATES, LTD. C. A. 5th Cir. [Certiorari granted, 481 U. S. 1068.] Motion of Global Marine, Inc., for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied.

No. 86–1650. TRANS WORLD AIRLINES, INC. *v.* INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS. C. A. 8th Cir. [Certiorari granted, 482 U. S. 913.] Motion of American Federation of Labor and Congress of Industrial Organizations et al. for leave to file a brief as *amici curiae* granted.

No. 87–376. LOS ANGELES MEMORIAL COLISEUM COMMISSION *v.* NATIONAL BASKETBALL ASSN. ET AL. C. A. 9th Cir. Motion of the parties to defer consideration of the petition for writ of certiorari granted.

No. 87–5374. IN RE ROSS. Petition for writ of mandamus denied.

No. 87–5381. IN RE CLARK. Petition for writ of mandamus and/or prohibition denied.

No. 87–5391. IN RE FAHNTRAPP. Petition for writ of prohibition denied.

Probable Jurisdiction Noted

No. 87–82. FEDERAL DEPOSIT INSURANCE CORPORATION *v.* MALLEN ET AL. Appeal from D. C. N. D. Iowa. Probable jurisdiction noted. Reported below: 667 F. Supp. 652.

No. 87–328. RILEY, DISTRICT ATTORNEY OF THE TENTH PROSECUTORIAL DISTRICT OF NORTH CAROLINA, ET AL. *v.* NATIONAL FEDERATION OF THE BLIND OF NORTH CAROLINA, INC., ET AL. Appeal from C. A. 4th Cir. Probable jurisdiction noted. Reported below: 817 F. 2d 102.

Certiorari Granted

No. 87–352. SUN OIL CO. *v.* WORTMAN ET AL. Sup. Ct. Kan. Certiorari granted. Reported below: 241 Kan. 226, 734 P. 2d 1190.

No. 87–5096. WEST *v.* ATKINS. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 815 F. 2d 993.

No. 87–5277. AMADEO *v.* KEMP, WARDEN. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 816 F. 2d 1502.

Certiorari Denied. (See also Nos. 87–345, 87–390, 87–5378, and 87–5439, *supra.*)

No. 86–1935. MASON *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 24 M. J. 127.

No. 86–2018. TURCHI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 815 F. 2d 697.

No. 86–2030. ANDRZJEWSKI ET AL. *v.* HORNER, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 811 F. 2d 571.

No. 86–6987. CAMPOS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 816 F. 2d 673.

No. 86–7001. TOBIAS *v.* FAIRMAN, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 818 F. 2d 33.

No. 86–7045. BROWN *v.* J. I. CASE CO. C. A. 7th Cir. Certiorari denied. Reported below: 813 F. 2d 848.

No. 86–7046. JORDAN *v.* MANZIE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 817 F. 2d 104.

No. 86–7085. ROBERTSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 815 F. 2d 714.

No. 86–7115. LEWIS *v.* KERBY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 86–7141. LEGARE *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied.

No. 87–19. WATTS *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 814 F. 2d 1576.

No. 87–70. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 809 F. 2d 1072.

No. 87–147. MADRID-PALACIOS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 817 F. 2d 759.

No. 87–215. CINTOLO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 818 F. 2d 980.

No. 87–217. COOK ET AL. *v.* PAN AMERICAN WORLD AIRWAYS, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 817 F. 2d 1030.

No. 87–226. BEAUFORD *v.* SISTERS OF MERCY, PROVINCE OF DETROIT, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 816 F. 2d 1104.

No. 87–270. DUTTON, WARDEN *v.* JOHNSON. C. A. 6th Cir. Certiorari denied. Reported below: 819 F. 2d 289.

No. 87–272. ENDICOTT ENTERPRISES, INC. *v.* UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL–CIO, LOCAL 2247, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 806 F. 2d 918.

No. 87–309. RITTER *v.* MOUNT ST. MARY'S COLLEGE. C. A. 4th Cir. Certiorari denied. Reported below: 814 F. 2d 986.

No. 87–319. ABRAHAMS ET AL. *v.* SHULMAN, DERIVATIVELY ON BEHALF OF CENTRAL JERSEY INDUSTRIES, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 819 F. 2d 1132.

No. 87–320. PATTERSON *v.* AIKEN ET AL.; and PATTERSON *v.* FLINT ET AL. Ct. App. Ga. Certiorari denied. Reported below: 182 Ga. App. 343, 355 S. E. 2d 738 (first case); 182 Ga. App. 650, 356 S. E. 2d 670 (second case).

No. 87–325. WINSLOWET-ALPS *v.* EDMONSTONE. C. A. 2d Cir. Certiorari denied. Reported below: 816 F. 2d 670.

No. 87–327. WHEELER *v.* ARAVE. C. A. 9th Cir. Certiorari denied. Reported below: 819 F. 2d 1147.

No. 87–331. DEAVER *v.* CABLE NEWS NETWORK, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 263 U. S. App. D. C. 66, 824 F. 2d 1046.

No. 87–334. ADRIAN ET UX. *v.* SMITH BARNEY, HARRIS UPHAM & CO., INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 815 F. 2d 655.

No. 87–338. EVICH ET AL. *v.* MORRIS, PERSONAL REPRESENTATIVE OF THE ESTATE OF CONNELLY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 819 F. 2d 256.

No. 87–344. DRESSER INDUSTRIES, INC. *v.* HUGHES TOOL CO. C. A. Fed. Cir. Certiorari denied. Reported below: 816 F. 2d 1549.

No. 87–349. NORTHROP CORP. *v.* TRIAD INTERNATIONAL MARKETING, S. A., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 811 F. 2d 1265.

No. 87–353. ARNOLD *v.* SOUTH CAROLINA PUBLIC SERVICE AUTHORITY. Sup. Ct. S. C. Certiorari denied. Reported below: 292 S. C. 396, 356 S. E. 2d 837.

No. 87–362. HYSLIP *v.* SLOAN, MAYOR OF VILLAGE OF ALFRED, ET AL. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 124 App. Div. 2d 1060, 508 N. Y. S. 2d 732.

No. 87–406. GRACEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 87–422. JUDSON *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 820 F. 2d 407.

No. 87–426. STEFANOPOULOS *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 818 F. 2d 867.

No. 87–440. HUGER *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 824 F. 2d 980.

No. 87–449. ALVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 816 F. 2d 443.

No. 87–463. MEHRA ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 824 F. 2d 297.

No. 87–5122. WHITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 87–5199. SPENCER *v.* PENNSYLVANIA UNEMPLOYMENT COMPENSATION BOARD OF REVIEW. Pa. Commw. Ct. Certiorari denied. Reported below: 93 Pa. Commw. 270, 504 A. 2d 991.

No. 87–5212. ABRAHAM *v.* WHITE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 820 F. 2d 1219.

No. 87–5356. BOYER *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 362 Pa. Super. 632, 520 A. 2d 1211.

No. 87–5357. YOUNG *v.* RABIDEAU ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 821 F. 2d 373.

No. 87–5361. GRAY *v.* PEPCO ET AL. Ct. App. D. C. Certiorari denied.

No. 87–5371. MARTIN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 150 Ill. App. 3d 1160, 514 N. E. 2d 1241.

No. 87–5373. HUNTER *v.* EVANS ET AL. C. A. 11th Cir. Certiorari denied.

No. 87–5375. BATTLE *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 87–5376. PEREZ *v.* SULLIVAN, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 87–5377. MAHDAVI *v.* THELEN, MARRIN, JOHNSON & BRIDGES ET AL. C. A. 9th Cir. Certiorari denied.

No. 87–5379. KOCHEL *v.* KOCHEL. C. A. 4th Cir. Certiorari denied. Reported below: 819 F. 2d 1138.

No. 87–5380. RHONE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 507 So. 2d 1071.

No. 87–5383. KURTZ *v.* KURTZ. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 87–5385. MUSTARD *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 711 S. W. 2d 71.

No. 87–5387. WALL *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 360 Pa. Super. 626, 517 A. 2d 205.

No. 87–5390. ROBERTS *v.* PETERSON, SUPERINTENDENT, OREGON STATE CORRECTIONAL INSTITUTE. C. A. 9th Cir. Certiorari denied. Reported below: 822 F. 2d 61.

No. 87–5393. WILLIAMS *v.* LENSING ET AL. C. A. 5th Cir. Certiorari denied.

No. 87–5394. OWENS *v.* FULCOMER. C. A. 3d Cir. Certiorari denied. Reported below: 829 F. 2d 32.

No. 87–5396. FELTON *v.* DIXON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 823 F. 2d 547.

No. 87–5398. ADAMS *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 824 F. 2d 973.

No. 87–5399. SIMMONS *v.* RUTHERFORD, CROCKETT & DEMARCO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 825 F. 2d 411.

No. 87–5400. FORD *v.* BUNNELL, SUPERINTENDENT, CALIFORNIA CORRECTIONAL INSTITUTION. Sup. Ct. Cal. Certiorari denied.

No. 87–5442. AUSTIN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 320 N. C. 276, 357 S. E. 2d 641.

No. 87–5450. FREEMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 87–5452. SOLEK *v.* NEW JERSEY DEPARTMENT OF PUBLIC ADVOCATE ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 87–5488. COLLINS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 829 F. 2d 32.

No. 87–5495. HOK HO KWAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 823 F. 2d 555.

No. 87–5496. RICHARDSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 520 A. 2d 692.

No. 87–5498. ZUMBADO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 826 F. 2d 14.

No. 86–1796. SEQUOIA BOOKS, INC. *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and reverse the judgment. Reported below: 149 Ill. App. 3d 383, 500 N. E. 2d 82.

No. 86–1987. SEQUOIA BOOKS, INC. *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and reverse the judgment of conviction. Reported below: 150 Ill. App. 3d 211, 501 N. E. 2d 856.

No. 87–134. UNITED STATES *v.* SHONDE. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 803 F. 2d 937.

No. 87–305. CONE *v.* FLORIDA BAR ET AL. C. A. 11th Cir. Motion of Ohio State Bar Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 819 F. 2d 1002.

No. 87–326. G. D. SEARLE & CO. *v.* SIMON ET AL. C. A. 8th Cir. Motions of Defense Research Institute and Trial Lawyers Association, Chamber of Commerce of the United States, Pharmaceutical Manufacturers Association, American Corporate Counsel Association, and American Insurance Association for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE BLACKMUN and JUSTICE O'CONNOR would grant certiorari. Reported below: 816 F. 2d 397.

No. 87–357. ARKANSAS *v.* PICKENS. Sup. Ct. Ark. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 292 Ark. 362, 730 S. W. 2d 230.

No. 87–359. CITY OF NEW YORK ET AL. *v.* EASTWAY CONSTRUCTION CORP. ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 821 F. 2d 121.

No. 87–5327. ROBBINS *v.* NORTH CAROLINA. Sup. Ct. N. C.;
No. 87–5364. WATKINS *v.* ALABAMA. Sup. Ct. Ala.; and
No. 87–5448. COLEMAN *v.* BASS, WARDEN. Sup. Ct. Va. Certiorari denied. Reported below: No. 87–5327, 319 N. C. 465, 356 S. E. 2d 279; No. 87–5364, 509 So. 2d 1074.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

OCTOBER 30, 1987

Miscellaneous Order

No. A–334 (87–5699). JONES *v.* BUTLER, WARDEN. Sup. Ct. La. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court.

NOVEMBER 2, 1987

Appeals Dismissed

No. 87–230. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* JORDAN ET AL. Appeal from D. C. W. D. Okla. dismissed for want of jurisdiction.

No. 87–411. CASILLAS ET AL. *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of substantial federal question. Reported below: 733 S. W. 2d 158.

No. 87–439. ENCALADE ET AL. *v.* LOUISIANA. Appeal from Ct. App. La., 4th Cir., dismissed for want of substantial federal question. Reported below: 505 So. 2d 87.

No. 87–414. POLYAK *v.* BOSTON ET AL. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 817 F. 2d 757.

No. 87–5523. DENARDO *v.* ALASKA. Appeal from Sup. Ct. Alaska dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 740 P. 2d 453.

Certiorari Granted—Vacated and Remanded

No. 87–5231. MALONE *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to the first question presented, judgment vacated, and case remanded for further consideration in light of the position presently asserted by the Solicitor General in his brief filed October 5, 1987. THE CHIEF JUSTICE dissents. Reported below: 816 F. 2d 675.

Miscellaneous Orders

No. — — ——. CLARK-COWLITZ JOINT OPERATING AGENCY *v.* FEDERAL ENERGY REGULATORY COMMISSION. Motion for leave to dispense with printing portions of the appendix to the petition for writ of certiorari denied. JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE O'CONNOR would grant the motion. JUSTICE SCALIA took no part in the consideration or decision of this motion.

No. — — ——. GREENE *v.* FRIEND OF THE COURT, POLK COUNTY, IOWA, ET AL. Motion to direct the Clerk to file a petition for writ of certiorari which does not comply with the Rules of this Court denied.

No. — — ——. MILLER *v.* CALIFORNIA. Motion to direct the Clerk to file the petition for writ of certiorari denied.

No. A–272 (87–535). DEBOCK *v.* FLORIDA. Sup. Ct. Fla. Application to continue stay of proceedings, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A–289. GILBERT ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, TULARE COUNTY, ET AL. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D–642. IN RE DISBARMENT OF PALOMO. Disbarment entered. [For earlier order herein, see 482 U. S. 911.]

No. D–648. IN RE DISBARMENT OF MONOKER. Disbarment entered. [For earlier order herein, see 483 U. S. 1040.]

No. D–649. IN RE DISBARMENT OF FILSOOF. Fred F. Filsoof, of Atlanta, Ga., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on July 29, 1987 [483 U. S. 1040], is hereby discharged.

No. D–659. IN RE DISBARMENT OF SHIRLEY. It is ordered that George P. Shirley, of Pebble Beach, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. Motion of Alaska for leave to participate in oral argument as *amicus curiae* and for divided argument denied. JUSTICE MARSHALL took no part in the consideration or decision of this motion. [For earlier order herein, see, *e. g.*, *ante*, p. 892.]

No. 94, Orig. SOUTH CAROLINA *v.* BAKER, SECRETARY OF THE TREASURY. It is ordered that the Honorable Matthew J. Jasen, retired, of Buffalo, N. Y., be appointed Special Master in place of the Honorable Samuel J. Roberts, deceased.

The Special Master shall have authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Special Master is directed to submit such reports as he may deem appropriate.

The compensation of the Special Master, the allowances to him, the compensation paid to his legal, technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses, including travel expenses, shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct. [For earlier order herein, see, *e. g.*, *ante*, p. 892.]

No. 104, Orig. NEW JERSEY *v.* NEVADA ET AL. It is ordered that Ralph I. Lancaster, Jr., Esq., of Portland, Me., be ap-

pointed Special Master in place of the Honorable Wade H. McCree, Jr., deceased.

The Special Master shall have authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Special Master is directed to submit such reports as he may deem appropriate.

The compensation of the Special Master, the allowances to him, the compensation paid to his legal, technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses, including travel expenses, shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct. [For earlier order herein, see, *e. g.*, 474 U. S. 1045.]

No. 86–1357. UNITED STATES DEPARTMENT OF JUSTICE ET AL. *v.* JULIAN ET AL. C. A. 9th Cir. [Certiorari granted, 482 U. S. 926.] Motion of respondent Margaret J. Wallace for leave to proceed further herein *in forma pauperis* granted.

No. 86–1552. DEPARTMENT OF THE NAVY *v.* EGAN. C. A. Fed. Cir. [Certiorari granted, 481 U. S. 1068.] Motion of Ralph B. Bogdanowicz for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied.

No. 86–1715. FEDERAL LABOR RELATIONS AUTHORITY *v.* ABERDEEN PROVING GROUND, DEPARTMENT OF THE ARMY. C. A. 4th Cir. [Certiorari granted, *ante*, p. 813.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 86–1753. DOE *v.* UNITED STATES. C. A. 5th Cir. [Certiorari granted, *ante*, p. 813.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 86–1781. SCHWEIKER ET AL. *v.* CHILICKY ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 814.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 86–6124. BENNETT *v.* ARKANSAS. Sup. Ct. Ark. [Certiorari granted, *ante*, p. 895.] Motion for appointment of counsel granted, and it is ordered that Thomas M. Carpenter, Esq., of Little Rock, Ark., be appointed to serve as counsel for petitioner in this case.

No. 87–4. WHEAT *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, *ante*, p. 814.] Motion of petitioner to dispense with printing the joint appendix denied.

No. 87–251. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* RUSSELL. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 87–382. STATE TAX COMMISSION OF THE STATE OF NEW YORK ET AL. *v.* HERZOG BROTHERS TRUCKING, INC., AKA HERZOG BROTHERS, INC., ET AL. Ct. App. N. Y. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 87–5411. IN RE SHIBUYA. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until November 23, 1987, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of mandamus without reaching the merits of the motion to proceed *in forma pauperis*.

No. 87–5425. ROBERTS *v.* ROBERTS. App. Ct. Ill., 3d Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until November 23, 1987, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 87–5436. JONES *v.* FARM CREDIT ADMINISTRATION. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until November 23, 1987, within

which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 87–5571. IN RE BROWN. Petition for writ of habeas corpus denied.

No. 87–405. IN RE YEE; and
No. 87–5555. IN RE ORCHARD. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 87–267. D. H. HOLMES CO., LTD. *v.* MCNAMARA, SECRETARY OF REVENUE AND TAXATION OF LOUISIANA. Appeal from Ct. App. La., 4th Cir. Probable jurisdiction noted. Reported below: 505 So. 2d 102.

No. 87–367. BENDIX AUTOLITE CORP. *v.* MIDWESCO ENTERPRISES, INC., ET AL. Appeal from C. A. 6th Cir. Probable jurisdiction noted. Reported below: 820 F. 2d 186.

No. 87–399. SUPREME COURT OF VIRGINIA ET AL. *v.* FRIEDMAN. Appeal from C. A. 4th Cir. Probable jurisdiction noted. Reported below: 822 F. 2d 423.

Certiorari Granted

No. 87–5461. HENSON *v.* EAST LINCOLN TOWNSHIP ET AL. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 814 F. 2d 410.

Certiorari Denied. (See also Nos. 87–414 and 87–5523, *supra*.)

No. 86–2053. PERTUIT ET UX. *v.* AMERICAN BANK. Ct. App. La., 5th Cir. Certiorari denied. Reported below: 503 So. 2d 154.

No. 86–6954. MARSH *v.* CITY OF MARYSVILLE. Ct. App. Ohio, Union County. Certiorari denied.

No. 86–7011. COLLINS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 727 S. W. 2d 565.

No. 86–7025. EARNEST *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 106 N. M. 411, 744 P. 2d 539.

No. 86–7060. PICKENS *v.* BUTLER, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 814 F. 2d 237.

No. 86–7071. KEHOE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 817 F. 2d 440.

No. 86–7078. AMES *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 126 App. Div. 2d 731, 511 N. Y. S. 2d 320.

No. 87–69. SACILOR, ACIERIES ET LAMINOIRS DE LORRAINE ET AL. *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 815 F. 2d 1488.

No. 87–92. ANR GASIFICATION PROPERTIES CO. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 813 F. 2d 193.

No. 87–98. BROWN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 817 F. 2d 754.

No. 87–116. OCHOA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 814 F. 2d 660.

No. 87–144. BOARD OF EDUCATION OF THE POLARIS JOINT VOCATIONAL SCHOOL DISTRICT ET AL. *v.* TYE. C. A. 6th Cir. Certiorari denied. Reported below: 811 F. 2d 315.

No. 87–145. BISHOP *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 224 Neb. 522, 399 N. W. 2d 271.

No. 87–153. MR. W. FIREWORKS, INC. *v.* BROCK, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. Reported below: 814 F. 2d 1042.

No. 87–176. WHITE ET AL. *v.* ELROD, SHERIFF OF COOK COUNTY, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 816 F. 2d 1172.

No. 87–180. SCHINMANN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 811 F. 2d 1508.

No. 87-186. MOLDED ACOUSTICAL PRODUCTS, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 815 F. 2d 934.

No. 87-204. EXPLOSIVES CORPORATION OF AMERICA ET AL. *v.* GARLAM ENTERPRISES CORP. ET AL.; and
No. 87-332. GARLAM ENTERPRISES CORP. *v.* EXPLOSIVES CORPORATION OF AMERICA ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 817 F. 2d 894.

No. 87-212. AMATEYUS LTD., DBA VOLK & HUXLEY, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 817 F. 2d 996.

No. 87-225. WILCOX *v.* FORD, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 813 F. 2d 1140.

No. 87-245. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* JORDAN ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 808 F. 2d 733.

No. 87-247. ARMSTRONG *v.* CORN BELT BANK; and
No. 87-432. CORN BELT BANK *v.* ARMSTRONG. C. A. 7th Cir. Certiorari denied. Reported below: 812 F. 2d 1024.

No. 87-249. HANDY *v.* NATIONAL SECURITY AGENCY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 813 F. 2d 1228.

No. 87-262. STANTON *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied.

No. 87-282. SOUTH BEND COMMUNITY SCHOOL CORP. ET AL. *v.* BRITTON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 819 F. 2d 766.

No. 87-286. U. S. TELECOM, INC., FKA U. S. TELEPHONE, INC., ET AL. *v.* SPEAKERS OF SPORT, INC. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 149 Ill. App. 3d 898, 501 N. E. 2d 318.

No. 87-365. BRIAN CLEWER, INC. *v.* PAN AMERICAN WORLD AIRWAYS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 811 F. 2d 1507.

No. 87-369. O'DONNELL *v.* LOCAL 165, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 151 Ill. App. 3d 1156, 515 N. E. 2d 485.

No. 87-378. NEWTON B. SCHWARTZ, P. C., ET AL. *v.* DEAN. C. A. 2d Cir. Certiorari denied. Reported below: 818 F. 2d 216.

No. 87-379. KRUZELOCK *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 87-383. FORT WAYNE MORTGAGE CO. *v.* WOOD. C. A. 11th Cir. Certiorari denied. Reported below: 818 F. 2d 754.

No. 87-385. PAUL, AKA PEREZ *v.* WATCHTOWER BIBLE & TRACT SOCIETY OF NEW YORK, INC. C. A. 9th Cir. Certiorari denied. Reported below: 819 F. 2d 875.

No. 87-386. LISTER *v.* NORTH AMERICAN ROCKWELL, AUTONETICS. C. A. 9th Cir. Certiorari denied. Reported below: 785 F. 2d 316.

No. 87-392. CORRIGAN, GUARDIAN OF CORRIGAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 815 F. 2d 954.

No. 87-393. CENTRAL STATES, SOUTHEAST & SOUTHWEST AREAS PENSION FUND ET AL. *v.* CENTRAL TRANSPORT, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 816 F. 2d 678.

No. 87-396. ILLINOIS STATE BOARD OF EDUCATION ET AL. *v.* BOARD OF EDUCATION OF CITY OF PEORIA, SCHOOL DISTRICT NO. 150. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 150 Ill. App. 3d 755, 502 N. E. 2d 730.

No. 87-402. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, ET AL. *v.* ALASKA AIRLINES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 813 F. 2d 1038.

No. 87-408. STRIPLIN *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 12 Kan. App. 2d lxxi, 761 P. 2d 1282.

No. 87-409. BUDINSKY, TDBA COLPAT MINE *v.* PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 819 F. 2d 418.

No. 87–410. MEXICANA AIRLINES *v.* WOLGEL ET UX. C. A. 7th Cir. Certiorari denied. Reported below: 821 F. 2d 442.

No. 87–418. MCARDLE *v.* E. R. SQUIBB & SONS, INC. C. A. 10th Cir. Certiorari denied.

No. 87–419. 1111 19TH STREET ASSOCIATES *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied. Reported below: 521 A. 2d 260.

No. 87–420. BLUMENTHAL *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 362 Pa. Super. 632, 520 A. 2d 1211.

No. 87–423. GARRATT ET AL. *v.* INVST FINANCIAL GROUP, INC. C. A. 6th Cir. Certiorari denied. Reported below: 815 F. 2d 391.

No. 87–424. GAINEY *v.* GILMAN PAPER CO., INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 819 F. 2d 1149.

No. 87–427. EARHART *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 362 Pa. Super. 634, 520 A. 2d 1212.

No. 87–428. EDGERTON *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 824 F. 2d 978.

No. 87–429. ADOLF, JUDGE, CIRCUIT COURT OF CITY OF ST. LOUIS *v.* WICHITA FALLS GENERAL HOSPITAL. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 728 S. W. 2d 604.

No. 87–430. ROJICEK *v.* COOLEY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 819 F. 2d 1130.

No. 87–433. VENCE ET AL. *v.* BOLIVAR COUNTY COMMUNITY ACTION PROGRAM, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 817 F. 2d 755.

No. 87–434. CONNECTICUT *v.* MITCHELL ET AL. Sup. Ct. Conn. Certiorari denied. Reported below: 204 Conn. 187, 527 A. 2d 1168.

No. 87–435. HAIGHT *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Santa Cruz. Certiorari denied.

No. 87–444. SMEGAL ET AL. *v.* GATEWAY FOODS OF MINNEAPOLIS, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 819 F. 2d 191.

No. 87–457. DUNSTER ET AL. *v.* METROPOLITAN DADE COUNTY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 791 F. 2d 1516.

No. 87–467. PENNSYLVANIA *v.* NELSON. Sup. Ct. Pa. Certiorari denied. Reported below: 514 Pa. 262, 523 A. 2d 728.

No. 87–471. HEILGEIST *v.* SUPREME COURT OF WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 138 Wis. 2d 503, 406 N. W. 2d 424.

No. 87–473. GENINA MARINE SERVICES, INC. *v.* MOBIL OIL EXPLORATION & PRODUCTION SOUTHEAST, INC. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 506 So. 2d 922.

No. 87–475. RODNITE ET UX. *v.* GRAHAM, GOVERNOR OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 818 F. 2d 872.

No. 87–479. ENERGY COOPERATIVE, INC., BY STEINBERG, TRUSTEE *v.* PHILLIPS PETROLEUM CO. C. A. 7th Cir. Certiorari denied. Reported below: 814 F. 2d 1226.

No. 87–493. SATO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 814 F. 2d 449.

No. 87–500. STEPHENS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 819 F. 2d 1140.

No. 87–501. LENNON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 814 F. 2d 185.

No. 87–503. GANOE ET AL. *v.* LUMMIS, TEMPORARY ADMINISTRATOR OF THE ESTATE OF HUGHES, ET AL. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 129 App. Div. 2d 1006, 514 N. Y. S. 2d 303.

No. 87–511. VACCARO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 816 F. 2d 443.

No. 87–528. LACHANCE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 817 F. 2d 1491.

No. 87–534. MOATES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 822 F. 2d 56.

No. 87–536. JERRY *v.* UAW, LOCAL 735, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 818 F. 2d 866.

No. 87–5031. PROWS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 808 F. 2d 1522.

No. 87–5046. MEDINA *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 189 Cal. App. 3d 39, 234 Cal. Rptr. 256.

No. 87–5057. VARONA-ALGOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 819 F. 2d 81.

No. 87–5064. TRUJILLO *v.* SULLIVAN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 815 F. 2d 597.

No. 87–5095. SHEPARD *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 818 F. 2d 615.

No. 87–5134. WILLIAMS *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 729 S. W. 2d 197.

No. 87–5156. CARMONA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 820 F. 2d 1229.

No. 87–5182. JOSEPH *v.* BUTLER, WARDEN. Sup. Ct. La. Certiorari denied. Reported below: 506 So. 2d 1221.

No. 87–5206. KUNKEL *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 138 Wis. 2d 531, 412 N. W. 2d 893.

No. 87–5283. JARMAN *v.* UNITED STATES DEPARTMENT OF COMMERCE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 814 F. 2d 655.

No. 87–5329. CABRERA *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 116 Ill. 2d 474, 508 N. E. 2d 708.

No. 87–5330. COLES *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. D. C. Cir. Certiorari denied.

No. 87–5403. LEWIS *v.* SHERIFF'S DEPARTMENT FOR THE CITY OF ST. LOUIS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 817 F. 2d 465.

No. 87–5404. GORDON *v.* YOUNG, MAYOR. C. A. 11th Cir. Certiorari denied.

No. 87–5410. ROBINSON *v.* ROSE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 823 F. 2d 553.

No. 87–5412. MOORE *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 87–5417. LEE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 117 Ill. 2d 28, 509 N. E. 2d 1001.

No. 87–5420. CHILDS *v.* HEHMAN, CLERK, UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, ET AL. C. A. 6th Cir. Certiorari denied.

No. 87–5423. HULSEY *v.* SARGENT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 821 F. 2d 469.

No. 87–5424. PACCHETTI *v.* MISSOURI. Ct. App. Mo., Southern Dist. Certiorari denied. Reported below: 729 S. W. 2d 621.

No. 87–5437. WOODEN *v.* MARTIN. Ct. App. Tenn. Certiorari denied.

No. 87–5441. LUTTRELL ET AL. *v.* MARTINEZ, GOVERNOR OF FLORIDA, ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 511 So. 2d 999.

No. 87–5443. EMANUEL *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 825 F. 2d 410.

No. 87–5444. BOATWRIGHT *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 822 F. 2d 63.

No. 87–5446. HENRIKSEN *v.* HENRIKSEN. Sup. Ct. Del. Certiorari denied. Reported below: 527 A. 2d 281.

No. 87–5447. WRIGHT *v.* VIRGINIA STATE BAR. Sup. Ct. Va. Certiorari denied. Reported below: 233 Va. 491, 357 S. E. 2d 518.

No. 87–5456. PEDRAZA *v.* HEARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 817 F. 2d 754.

No. 87–5460. CARTER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 87–5462. BURSE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 87–5463. BROWN *v.* PARKER, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 87–5464. BROWN *v.* NEWSOME, SUPERINTENDENT, GEORGIA STATE PRISON, ET AL. C. A. 11th Cir. Certiorari denied.

No. 87–5465. HART *v.* HEDRICK. C. A. 4th Cir. Certiorari denied. Reported below: 825 F. 2d 406.

No. 87–5466. LEGRAND *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 87–5471. GREEN *v.* MEACHUM ET AL. C. A. 10th Cir. Certiorari denied.

No. 87–5473. EL-MUMIT *v.* FOGG, JUDGE, TWENTY-FIRST JUDICIAL DISTRICT COURT OF LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 505 So. 2d 733.

No. 87–5475. SMITH *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 87–5478. STROUSE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 826 F. 2d 1066.

No. 87–5481. FANT *v.* ENRIGHT ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 87–5485. CHRISTOW *v.* CRAPELLA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 822 F. 2d 52.

No. 87–5490. BEY *v.* PHILADELPHIA PASSPORT AGENCY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 829 F. 2d 30.

No. 87–5494. HOLLEMAN *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 826 F. 2d 10.

No. 87–5499. MANGONE *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON. C. A. 3d Cir. Certiorari denied.

No. 87–5511. DAVIS *v.* CLERK OF THE CIRCUIT COURT OF NOTTOWAY COUNTY. C. A. 4th Cir. Certiorari denied. Reported below: 828 F. 2d 18.

No. 87–5513. GREEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 829 F. 2d 31.

No. 87–5514. MUNOZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 824 F. 2d 973.

No. 87–5515. GATZONIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 805 F. 2d 72.

No. 87–5519. HASAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 823 F. 2d 1553.

No. 87–5520. LEPISCOPO *v.* SULLIVAN, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 87–5527. RADEMAKER *v.* TEACHERS COLLEGE, COLUMBIA UNIVERSITY. C. A. 2d Cir. Certiorari denied. Reported below: 823 F. 2d 545.

No. 87–5531. HEATH ET AL. *v.* WARNER COMMUNICATIONS ET AL. C. A. 2d Cir. Certiorari denied.

No. 87–5540. CAVADA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 821 F. 2d 1046.

No. 87–5542. VAN STRATEN *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 139 Wis. 2d 861, 415 N. W. 2d 162.

No. 87–5552. PARKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 825 F. 2d 408.

No. 87–5558. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 87–5580. TAYLOR *v.* SOWDERS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 826 F. 2d 1065.

No. 87–5583. ROBINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 823 F. 2d 549.

No. 87–5585. ROLLINS ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 87–5592. GOVE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 831 F. 2d 280.

No. 87–5593. JACKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 818 F. 2d 867.

No. 87–5595. FALCON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 87–5603. LAROQUE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 822 F. 2d 56.

No. 87–5605. BAUSMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 829 F. 2d 32.

No. 87–5606. DIAZ *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 821 F. 2d 153.

No. 87–5609. WILSON *v.* MONUMENTAL LIFE INSURANCE CO. C. A. 4th Cir. Certiorari denied. Reported below: 820 F. 2d 1220.

No. 87–5619. BUSSEY *v.* LEVY, FERGUSON & GRADY ET AL. C. A. 10th Cir. Certiorari denied.

No. 87–5641. HOLLIMAN *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 257 Ga. 209, 356 S. E. 2d 886.

No. 86–6960. CLOZZA *v.* BAIR, WARDEN. Sup. Ct. Va.;
No. 87–5256. PETERSON *v.* BASS, WARDEN. Sup. Ct. Va.;
No. 87–5257. WHITEHEAD *v.* ILLINOIS. Sup. Ct. Ill.;
No. 87–5414. PEOPLES *v.* ALABAMA. Sup. Ct. Ala.;
No. 87–5427. LILES *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 87–5433. GUINAN *v.* MISSOURI. Sup. Ct. Mo.;
No. 87–5445. PAYNE *v.* VIRGINIA. Sup. Ct. Va.;
No. 87–5451. ROSE *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla.;
No. 87–5469. GILMORE *v.* MISSOURI. Ct. App. Mo., Eastern Dist.;
No. 87–5493. MALLETT *v.* MISSOURI. Sup. Ct. Mo.;
No. 87–5627. SELVAGE *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir.; and
No. 87–5638. BELL *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: No. 87–5257, 116 Ill. 2d 425, 508 N. E. 2d 687; No. 87–5414, 510 So. 2d 574; No. 87–5433, 732 S. W. 2d 174;

No. 87–5445, 233 Va. 460, 357 S. E. 2d 500; No. 87–5451, 508 So. 2d 321; No. 87–5469, 731 S. W. 2d 369; No. 87–5493, 732 S. W. 2d 527; No. 87–5627, 823 F. 2d 845; No. 87–5638, 828 F. 2d 1085.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 87–148. LINDSEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 816 F. 2d 683.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

The issue here is whether a defendant's rights under the Due Process and Confrontation Clauses are violated when the Government forces a witness to take the stand solely to invoke his privilege against self-incrimination in front of the jury even though the Government already knew that the witness would refuse to testify. In this case, petitioner was convicted of mail fraud. At the trial, the Government called as a witness an unindicted co-conspirator who was alleged to have engaged in the same kind of conduct for which petitioner was indicted. The witness' attorney informed the prosecutor and the court that his client would invoke the privilege if he were called to testify, and the witness did invoke the privilege when he was called outside the presence of the jury. When the jury returned, the prosecution called the witness and he was permitted to testify after the trial court overruled petitioner's objection. Once again, after stating his name and place of residence, the witness invoked the Fifth Amendment privilege and refused to testify in response to five different questions. On appeal, a panel of the Sixth Circuit noted that this practice is "'so imbued with the "potential for unfair prejudice" that a trial judge should closely scrutinize any such request.'" *United States* v. *Lewis*, Nos. 86–5377 and 86–5379 (Apr. 17, 1987), App. to Pet. for Cert. 9a (quoting *United States* v. *Vandetti*, 623 F. 2d 1144, 1147 (CA6 1980)). Nonetheless, it held that the trial court did not commit reversible error when it permitted the witness to testify and gave a cautionary instruction to the jury not to consider the witness' actions as bearing on the guilt or innocence of any of the defendants. *Ibid.* The position of the Sixth Circuit, which is

consistent with that of a number of the Circuits, conflicts with the position of at least two other Circuits. *United States* v. *King*, 461 F. 2d 53, 57, and n. 4 (CA8 1972) (calling a witness in these circumstances, where no useful purpose would be served, was error notwithstanding that a curative instruction was given); *United States* v. *Roselli*, 432 F. 2d 879 (CA9 1970) (disapproving the calling of a witness before the jury after he has indicated that he will decline to testify, though the error did not prejudice the defendant where it was a momentary episode in a 6-month trial), cert. denied, 401 U. S. 924 (1971). See also *United States* v. *Ritz*, 548 F. 2d 510 (CA5 1977). The split among the Circuits on this issue warrants our granting certiorari.

No. 87–216. CITY OF FONTANA ET AL. *v.* SMITH, ADMINISTRATRIX OF THE ESTATE OF SMITH, ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 818 F. 2d 1411.

No. 87–370. FAULKNER ET AL. *v.* MERIWETHER. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 821 F. 2d 408.

No. 87–485. MASSACHUSETTS *v.* REPOZA. Sup. Jud. Ct. Mass. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 400 Mass. 516, 510 N. E. 2d 755.

No. 87–5172. MATTHEWS *v.* PIERCE, SECRETARY OF HOUSING AND URBAN DEVELOPMENT. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari.

No. 87–5222. WILLIAMS *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 814 F. 2d 205.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231–241 (1976) (MARSHALL, J., dissenting), I would grant the petition for writ of certiorari. Even if I did not hold this view, I would grant the petition in order to resolve the question whether the State may, consistent with the Eighth and Fourteenth Amend-

ments, introduce evidence of unadjudicated criminal conduct at the punishment phase of a capital trial. This claim presents a serious constitutional issue that has provoked a number of conflicting court decisions nationwide. The petition also presents a second question worthy of our review, namely, whether a State violates the Equal Protection Clause when it permits the sentencer to consider evidence of unadjudicated offenses in capital cases but not in noncapital cases.

I

Petitioner James Williams was sentenced to death under a Texas capital punishment statute that requires the jury to determine beyond a reasonable doubt that the defendant, if permitted to live, would commit criminal acts of violence that would constitute a continuing threat to society. See Tex. Crim. Proc. Code. Ann., Art. 37.071(b)(2) (Vernon Supp. 1986–1987). To prove this circumstance, the State relied in large part on eyewitness testimony that petitioner had participated in a restaurant robbery 10 days before the murder. Petitioner never had been charged with, much less convicted of, this crime. The court did not caution the jury that it had to find petitioner had committed the crime by any particular standard of proof before considering the evidence in its calculation of future dangerousness. Indeed, the jury was encouraged not to do so by the State's attorney, who stated:

> "You don't have to go back there and find him guilty of [the robbery]. You don't have to write a verdict for that. This is here to let you see what he did ten days prior." Pet. for Cert. 4.

In his federal petition for a writ of habeas corpus, petitioner argued that Texas' sentencing scheme violates the Eighth and Fourteenth Amendments because it permits the introduction of evidence of unadjudicated criminal conduct at the sentencing hearing of a capital trial. Williams also contended, in the alternative, that Texas' sentencing scheme violates the Equal Protection Clause of the Fourteenth Amendment because the State permits the introduction of unadjudicated offenses in capital-sentencing trials while forbidding the use of such evidence in noncapital-sentencing proceedings, see *Jones* v. *State*, 479 S. W. 2d 307 (Tex. Crim. App. 1972). The Court of Appeals for the Fifth Circuit rejected both claims. 814 F. 2d 205 (1987).

II

Whether a State may introduce evidence of unadjudicated offenses in the sentencing phase of a capital trial is a vexing question with respect to which the state courts are in considerable need of guidance. The courts that have considered the question have provided inconsistent responses. A number have held that a State may not introduce evidence of unadjudicated crimes to prove a statutory aggravating factor at the sentencing phase of a capital trial. See *State* v. *Bobo*, 727 S. W. 2d 945, 952–953 (Tenn.), cert. denied, *ante*, p. 872; *State* v. *Bartholomew*, 101 Wash. 2d 631, 640–642, 683 P. 2d 1079, 1085–1086 (1984) (en banc); *State* v. *McCormick*, 272 Ind. 272, 277–278, 397 N. E. 2d 276, 280 (1979); *Cook* v. *State*, 369 So. 2d 1251, 1257 (Ala. 1978). Other state courts have held that although evidence of unadjudicated crimes is inadmissible to prove that the criminal act took place, such evidence is admissible to show "defendant's characteristics," *State* v. *Skipper*, 285 S. C. 42, 48–49, 328 S. E. 2d 58, 62 (1985), rev'd on other grounds, 476 U. S. 1 (1986), or "'other matter[s] which the court deems relevant to sentence.'" *Crump* v. *State*, 102 Nev. 158, 161, 716 P. 2d 1387, 1388–1389 (quoting Nev. Rev. Stat. § 175.552 (1985)), cert. denied 479 U. S. 870 (1986). At least one state court has indicated that unadjudicated-crimes evidence may be admitted, but only if the court instructs the jury that it must find beyond a reasonable doubt that the defendant committed the crime before it can use the evidence in its sentencing determinations. See *People* v. *Easley*, 187 Cal. Rptr. 745, 758–761, 654 P. 2d 1272, 1286–1288 (1982), vacated on other grounds, 34 Cal. 3d 858, 671 P. 2d 813 (1983). Still others, including Texas, have found that that the admission of such evidence is not of constitutional significance and have required merely that the evidence be relevant. See *Milton* v. *State*, 599 S. W. 2d 824, 827 (Tex. Crim. App. 1980) (en banc), cert. denied, 451 U. S. 1031 (1981); *Fair* v. *State*, 245 Ga. 868, 870–871, 268 S. E. 2d 316, 319–320, cert. denied, 449 U. S. 986 (1980).

As Texas' prohibition against the use of unadjudicated offenses in noncapital cases suggests, the use of such evidence at sentencing is at tension with the fundamental principle that a person not be punished for a crime that the State has not shown he committed. In the context of capital sentencing, this tension becomes irreconcilable. This Court has repeatedly stressed that because the death penalty is qualitatively different from any other crimi-

nal punishment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.). In my view, imposition of the death penalty in reliance on mere allegations of criminal behavior fails to comport with the constitutional requirement of reliability. A conviction signals that the underlying criminal behavior has been proved beyond a reasonable doubt to the satisfaction of an unbiased jury in conformance with constitutional safeguards. The testimony on which the State relied in this case, by contrast, carries with it no similar indicia of reliability.

It could be argued that the reliability problem can be mitigated by instructing the jury to consider evidence of unadjudicated offenses only if it finds beyond a reasonable doubt that the defendant committed the crime. This approach concedes that the Constitution requires a jury to determine that the alleged criminal conduct actually occurred. Once this concession is made, however, the intractability of such an approach becomes apparent. For if a defendant has a right to have a jury find that he committed a crime before it uses evidence of that crime to sentence him to die, he has a right that the jury that makes the determination be impartial. A jury that already has concluded unanimously that the defendant is a first-degree murderer cannot plausibly be expected to evaluate charges of other criminal conduct without bias and prejudice. Several state courts have concluded for this reason that introduction of evidence of unadjudicated offenses violates a defendant's due process right to an impartial jury. See *State* v. *Bobo*, *supra*, at 952–953; *State* v. *Bartholomew*, *supra*, at 640–642, 683 P. 2d, at 1085–1086; *State* v. *McCormick*, *supra*; *Cook* v. *State*, *supra*, at 1257.

In *Williams* v. *New York*, 337 U. S. 241 (1949), this Court let stand the imposition of the death penalty by a judge who had received evidence of unadjudicated offenses, reasoning that death is no different from any other punishment. See *id.*, at 251–252. In *Gardner* v. *Florida*, 430 U. S. 349, 357–358 (1977) (opinion of STEVENS, J.), however, it was recognized that the view expressed in *Williams* no longer prevails, and that the death penalty is qualitatively different from other punishments. Since then, we have invalidated a number of procedural rules that called into question the reliability of the sentencing determination. See *Beck* v. *Ala-*

bama, 447 U. S. 625, 638 (1980) (citing cases). In my view, the Court's jurisprudence in this area raises serious doubts as to whether a State may ever, consistent with the Eighth and Fourteenth Amendments, introduce evidence of unadjudicated crimes at the sentencing phase of a capital trial. In any event, it appears beyond dispute that the issue is both significant and recurring, and one on which the lower courts are in disarray. I would grant the petition for certiorari to resolve this pressing question.

III

The State's use of evidence of unadjudicated offenses is particularly disturbing because Texas generally forbids the use of such evidence in sentencing determinations for *non*capital crimes, reasoning that the evidence poses too great a danger of undue prejudice and confusion. See *Jones* v. *State*, 479 S. W. 2d 307 (Tex. Crim. App. 1972). Williams argues that Texas' practice of not adhering to this practice during capital sentencing violates the Equal Protection Clause. The Court of Appeals rejected this claim, reasoning that "[g]iven the finality of a death sentence, Texas has a strong interest in ensuring that all relevant evidence concerning the capital defendant is placed before the jury so that it can consider the evidence when answering the special issues." 814 F. 2d, at 208. I can think of no constitutionally legitimate reason why evidence of unadjudicated offenses should be admissible in capital cases but not in other cases. The decision of the Court of Appeals sanctions a *reduction* of procedural protection for the very reason that the defendant's life is at stake. This conclusion cuts sharply against the grain of this Court's capital jurisprudence. Recognizing the greater finality and severity of the death penalty, we have repeatedly scrutinized and enhanced the procedural protections afforded a defendant in a capital-sentencing proceeding. See *Eddings* v. *Oklahoma*, 455 U. S. 104, 117–118 (1982) (O'CONNOR, J., concurring) ("Because sentences of death are 'qualitatively different' from prison sentences, this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake") (citation omitted); *Ake* v. *Oklahoma*, 470 U. S. 68, 87 (1985) (Burger, C. J., concurring in judgment) ("In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases").

Texas' sentencing system adopts precisely the converse reasoning; it singles out capital defendants for less procedural protection. This diminution of safeguards for capital defendants only is both perverse and at odds with the decisions of this Court. I therefore would grant the petition for certiorari in order to consider Williams' equal protection claim should this Court reject his more sweeping attack on Texas' sentencing procedures.

Rehearing Denied

No. 87–5208. WILLIAMS *v.* FEDERICO ET AL., *ante*, p. 803. Petition for rehearing denied.

NOVEMBER 9, 1987

Appeals Dismissed

No. 87–100. LYNCH ET AL. *v.* CITY OF CHICAGO ET AL. Appeal from App. Ct. Ill., 1st Dist., dismissed for want of substantial federal question. Reported below: 151 Ill. App. 3d 354, 502 N. E. 2d 283.

No. 87–441. BIRDSALL ET AL. *v.* SHEPHERD ET AL. Appeal from Sup. Ct. Va. dismissed for want of substantial federal question.

No. 87–456. SIM *v.* COMISKEY ET AL. Appeal from Sup. Ct. Neb. dismissed for want of substantial federal question. Reported below: 225 Neb. 181, 403 N. W. 2d 721.

No. 87–446. KELLER *v.* OKLAHOMA. Appeal from Ct. Crim. App. Okla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 738 P. 2d 186.

Miscellaneous Orders

No. D–645. IN RE DISBARMENT OF FREUDENBERG. Disbarment entered. [For earlier order herein, see 483 U. S. 1017.]

No. D–653. IN RE DISBARMENT OF VAUGHN. Disbarment entered. [For earlier order herein, see 483 U. S. 1052.]

No. D–660. IN RE DISBARMENT OF SCHULER. It is ordered that William F. Schuler, of San Francisco, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–661. IN RE DISBARMENT OF SULLIVAN. It is ordered that Arthur J. Sullivan, of Wilmington, Del., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–662. IN RE DISBARMENT OF VAVRIK. It is ordered that Robert J. Vavrik, of McHenry, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 86–935. REGENTS OF THE UNIVERSITY OF CALIFORNIA *v.* PUBLIC EMPLOYMENT RELATIONS BOARD ET AL. Ct. App. Cal., 1st App. Dist. [Probable jurisdiction noted, 483 U. S. 1004.] Motion of National Education Association et al. for leave to file a brief as *amici curiae* granted.

No. 86–1013. LYNG, SECRETARY OF AGRICULTURE, ET AL. *v.* NORTHWEST INDIAN CEMETERY PROTECTIVE ASSN. ET AL. C. A. 9th Cir. [Certiorari granted, 481 U. S. 1036.] Motion of respondents for leave to file out-of-time motion for divided argument denied.

No. 86–1992. IMMIGRATION AND NATURALIZATION SERVICE *v.* PANGILINAN ET AL.; and

No. 86–2019. IMMIGRATION AND NATURALIZATION SERVICE *v.* MANZANO. C. A. 9th Cir. [Certiorari granted, *ante*, p. 814.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 87–205. ALASKA MINERS ASSN. *v.* TRUSTEES FOR ALASKA ET AL. Sup. Ct. Alaska;

No. 87–206. ALASKA *v.* TRUSTEES FOR ALASKA ET AL. Sup. Ct. Alaska;

No. 87–371. TRUSTEES FOR ALASKA ET AL. *v.* ALASKA ET AL. Sup. Ct. Alaska; and

No. 87–482. EASTER SEAL SOCIETY FOR CRIPPLED CHILDREN & ADULTS OF LOUISIANA, INC. *v.* PLAYBOY ENTERPRISES, INC., ET AL. C. A. 5th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 87–453. AMERADA HESS CORP. ET AL. *v.* DIRECTOR, DIVISION OF TAXATION, NEW JERSEY DEPARTMENT OF THE TREASURY; and

No. 87-464. TEXACO INC. ET AL. *v.* DIRECTOR, DIVISION OF TAXATION, NEW JERSEY DEPARTMENT OF THE TREASURY. Appeals from Sup. Ct. N. J. The Solicitor General is invited to file a brief in these cases expressing the views of the United States. JUSTICE O'CONNOR took no part in the consideration or decision of this order.

No. 87-5502. IN RE GILBERT. Petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 87-253. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* KENDRICK ET AL.;

No. 87-431. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* KENDRICK ET AL.; and

No. 87-462. KENDRICK ET AL. *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. Appeals from D. C. D. C. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 657 F. Supp. 1547.

Certiorari Granted

No. 87-336. VAN CAUWENBERGHE *v.* BIARD. C. A. 9th Cir. Certiorari granted.

No. 87-526. FELDER *v.* CASEY ET AL. Sup. Ct. Wis. Certiorari granted. Reported below: 139 Wis. 2d 614, 408 N. W. 2d 19.

Certiorari Denied. (See also No. 87-446, *supra.*)

No. 86-6902. FUNKHOUSER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 734 P. 2d 815.

No. 86-7048. JOHNSON *v.* SWYKA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 813 F. 2d 397.

No. 86-7106. MOON *v.* KEMP, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 815 F. 2d 716.

No. 86-7121. BURTON *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 810 F. 2d 118.

No. 86-7131. WALEN *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 87-62. SCHMIDT ET UX. *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 29 Ohio St. 3d 32, 505 N. E. 2d 627.

No. 87–140. CHAMBERLAIN ET AL. *v.* UNITED STATES ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 826 F. 2d 16.

No. 87–234. ROBERTS ET AL. *v.* SECRETARY OF LABOR ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 813 F. 2d 524.

No. 87–239. MOYE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 823 F. 2d 545.

No. 87–240. MIZE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 820 F. 2d 118.

No. 87–281. GOLDSTEIN *v.* CRAWFORD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 259 U. S. App. D. C. 279, 815 F. 2d 117.

No. 87–292. DEL RIVO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 818 F. 2d 867.

No. 87–368. BANK OF NEW ENGLAND, N. A. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 821 F. 2d 844.

No. 87–389. NORRIS *v.* WIRTZ, TRUSTEE, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 818 F. 2d 1329.

No. 87–412. VILARDO ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 87–450. BURTENSHAW *v.* FERRY. Super. Ct. Pa. Certiorari denied.

No. 87–459. NATIONAL IRANIAN OIL CO. *v.* ASHLAND OIL, INC. C. A. 5th Cir. Certiorari denied. Reported below: 817 F. 2d 326.

No. 87–461. J & J LOG & LUMBER CO. *v.* GLOBE MACHINE MANUFACTURING CO. C. A. 9th Cir. Certiorari denied. Reported below: 822 F. 2d 61.

No. 87–465. INTOWN INVESTORS, INC. *v.* AVIS RENT-A-CAR SYSTEM, INC. C. A. 6th Cir. Certiorari denied. Reported below: 820 F. 2d 405.

No. 87–466. SADLER *v.* ALUMISMITHS, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 822 F. 2d 1090.

No. 87–474. COLLIA ET AL. *v.* MCJUNKIN CORP. Sup. Ct. App. W. Va. Certiorari denied. Reported below: —— W. Va. ——, 358 S. E. 2d 242.

No. 87–480. HEARD, SHERIFF *v.* CURRY. C. A. 5th Cir. Certiorari denied. Reported below: 819 F. 2d 130.

No. 87–481. LYONS *v.* JACKSON, JUDGE, COMMON PLEAS COURT, LAKE COUNTY, OHIO. C. A. 6th Cir. Certiorari denied. Reported below: 820 F. 2d 1225.

No. 87–483. ATWOOD *v.* SIPPLE ET AL. Ct. App. Ga. Certiorari denied. Reported below: 182 Ga. App. 831, 357 S. E. 2d 273.

No. 87–487. WYOMING COMMUNITY DEVELOPMENT AUTHORITY ET AL. *v.* DURNING ET UX. C. A. 9th Cir. Certiorari denied. Reported below: 815 F. 2d 1265.

No. 87–504. RICHENDOLLAR *v.* DIAMOND M DRILLING CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 819 F. 2d 124.

No. 87–506. NEW JERSEY *v.* DELUCA. Sup. Ct. N. J. Certiorari denied. Reported below: 108 N. J. 98, 527 A. 2d 1355.

No. 87–566. GERMAN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 525 A. 2d 596.

No. 87–567. WORTHINGTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 822 F. 2d 315.

No. 87–597. ROBINSON *v.* SECRETARY OF TRANSPORTATION ET AL. C. A. 10th Cir. Certiorari denied.

No. 87–598. MARRAPESE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 826 F. 2d 145.

No. 87–5092. WATTS ET AL. *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 814 F. 2d 612.

No. 87–5106. WILSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 126 App. Div. 2d 970, 511 N. Y. S. 2d 746.

No. 87–5126. MCQUEEN *v.* GARRISON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 814 F. 2d 951.

No. 87–5169. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 817 F. 2d 759.

No. 87–5304. PENNELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 820 F. 2d 1225.

No. 87–5344. GAUS *v.* BLUFFTON BANNER NEWSPAPER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 822 F. 2d 1090.

No. 87–5432. WEICHERT *v.* UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT. C. A. 2d Cir. Certiorari denied.

No. 87–5474. TUITT *v.* FAIR, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF CORRECTION. C. A. 1st Cir. Certiorari denied. Reported below: 822 F. 2d 166.

No. 87–5477. ANA LEON T. *v.* FEDERAL RESERVE BANK OF CHICAGO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 823 F. 2d 928.

No. 87–5479. VEARRIER *v.* POLK COUNTY HUMANE SOCIETY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 822 F. 2d 1094.

No. 87–5480. SEABORN *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 823 F. 2d 548.

No. 87–5484. KEMPER *v.* ESTELLE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 87–5486. CLARK *v.* WOOD, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 823 F. 2d 1241.

No. 87–5492. CROSS *v.* MCMACKIN, SUPERINTENDENT, MARION CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied. Reported below: 827 F. 2d 769.

No. 87–5497. PIERCE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 827 F. 2d 765.

No. 87–5501. MOODY *v.* FERGUSON. C. A. 5th Cir. Certiorari denied.

No. 87–5503. GILBERT *v.* WILLINGBORO BOARD OF EDUCATION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 817 F. 2d 751.

No. 87–5506. HORTON *v.* TRAMMELL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 828 F. 2d 19.

No. 87–5507. BLACK *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 828 F. 2d 771.

No. 87–5508. ALMODOVAR *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 190 Cal. App. 3d 732, 235 Cal. Rptr. 616.

No. 87–5509. WRIGHT *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 824 F. 2d 973.

No. 87–5518. JOHNSON *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 507 N. E. 2d 980.

No. 87–5521. LEPISCOPO *v.* KGGM TELEVISION ET AL. C. A. 10th Cir. Certiorari denied.

No. 87–5522. MAYBERRY *v.* PETSOCK. C. A. 3d Cir. Certiorari denied. Reported below: 821 F. 2d 179.

No. 87–5529. SMITH *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 87–5553. RUSSELL *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 84 N. C. App. 383, 352 S. E. 2d 922.

No. 87–5554. SHADIAN *v.* NORTH ORANGE COUNTY MUNICIPAL COURT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 810 F. 2d 206.

No. 87–375. MONGE, SHERIFF OF SARASOTA COUNTY, FLORIDA, ET AL. *v.* STRAUB. C. A. 11th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 815 F. 2d 1467.

No. 87–447. CASTILLE, DISTRICT ATTORNEY OF PHILADELPHIA COUNTY *v.* HARRIS ET AL. C. A. 3d Cir. Motion of respondents Martin Harris et al. for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 820 F. 2d 592.

No. 87–5077. BROOKS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 505 So. 2d 714.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 87–5170. MCCULLOCH *v.* UNITED STATES; and
No. 87–5266. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 822 F. 2d 63.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

In March 1981, petitioners were tried for their participation in an interstate network that duplicated and distributed unauthorized reproductions of copyrighted sound recordings—so-called "pirated" tape recordings. At the conclusion of their trial, petitioners were convicted of numerous counts of interstate transportation of pirated tapes (18 U. S. C. § 2314), conspiracy to violate the copyright laws, and wire fraud. Also, using these substantive convictions as "predicate acts," the Government successfully prosecuted petitioners for conducting (and conspiring to conduct) a racketeering enterprise in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO). 18 U. S. C. §§ 1962(c) and (d).

Subsequently, in *Dowling* v. *United States*, 473 U. S. 207 (1985), this Court held that criminal penalties could not be imposed for interstate transportation of pirated tapes under § 2314. As a result, petitioners initiated this action, pursuant to 28 U. S. C. § 2255 to have their convictions set aside. The District Court vacated the convictions under § 2314, but refused to alter petitioners' convictions for wire fraud or the RICO violations. *Cooper* v. *United States*, 639 F. Supp. 176 (MD Fla. 1986). The Court of Appeals affirmed in a judgment order, 822 F. 2d 63 (CA11 1987), relying on the District Court's opinion. App. to Pet. for Cert. in No. 87–5170, p. A–2.

These petitions present the question whether a RICO conviction may stand when some—but not all—of a defendant's convictions for the predicate acts which are the basis of his RICO conviction are vacated. Here, the District Court vacated 6 of petitioner McCulloch's 11 predicate-act convictions, and 6 of petitioner Jones' 14 convictions. *Cooper, supra,* at 187. The jury's verdict on the RICO counts did not indicate which of these various predicate acts formed the basis on which it found "a pattern of racketeering activity." 18 U. S. C. § 1962(c). The District Court allowed the RICO convictions to stand.

The courts below followed a prior decision of the Fifth Circuit, *United States* v. *Peacock*, 654 F. 2d 339 (1981), cert. denied, 464 U. S. 965 (1983). There, the Fifth Circuit vacated several convictions for predicate acts committed by three RICO defendants, but concluded that where "each of the appellants [was properly] convicted by the jury of at least two racketeering acts which were related to the . . . enterprise," their RICO convictions remained valid. 654 F. 2d, at 348. The Fifth Circuit recognized that this holding was in conflict with an opposing conclusion reached in *United States* v. *Brown*, 583 F. 2d 659 (1978), cert. denied, 440 U. S. 909 (1979), where the Third Circuit reversed two defendants' RICO convictions when two of their four convictions for predicate acts were found to be invalid. 583 F. 2d, at 669. The Seventh and the Ninth Circuits have recognized this conflict, but have declined to adopt either position to date. See *United States* v. *Anderson*, 809 F. 2d 1281, 1284–1285 (CA7 1987); *United States* v. *Lopez*, 803 F. 2d 969, 976 (CA9 1986), cert. denied, 481 U. S. 1030 (1987).

Because of the disagreement and uncertainty among the Courts of Appeals over the proper application of this important federal criminal statute, I would grant certiorari to resolve the conflict.

No. 87–5298. FINESTONE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 816 F. 2d 583.

No. 87–5505. DEVIER *v.* KEMP, WARDEN. Sup. Ct. Ga. Certiorari denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth

and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231–241 (1976) (MARSHALL, J., dissenting), I would grant the petition for writ of certiorari. Yet even if I did not hold this view, I would grant the petition to resolve the question whether, or under what circumstances, evidence of crimes for which the defendant has not been tried or convicted may be introduced at the sentencing phase of a capital trial. As I recently argued in *Williams* v. *Lynaugh*, *ante*, p. 935 (MARSHALL, J., dissenting from denial of certiorari), the admission of evidence of unadjudicated crimes at the sentencing phase impinges on the unique constitutional concern for reliability in capital trials. The question whether the State may introduce such evidence without violating the Eighth and Fourteenth Amendments has also prompted a number of conflicting decisions nationwide. Compare *State* v. *Bobo*, 727 S. W. 2d 945, 952–953 (Tenn.) (unadjudicated-crimes evidence not admissible), cert. denied, *ante*, p. 872, and *State* v. *Bartholomew*, 101 Wash. 2d 631, 640–642, 683 P. 2d 1079, 1085–1086 (1984) (en banc) (same), with *Milton* v. *State*, 599 S. W. 2d 824, 827 (Tex. Crim. App. 1980) (en banc) (unadjudicated-crimes evidence admissible). This case again demonstrates that the Court should resolve this important question.

Petitioner Darrell Gene Devier was convicted of rape and murder and sentenced to death. At the sentencing phase of his trial, the State, over defense counsel's objection, introduced the testimony of Linda Elrod. Ms. Elrod, a minor, testified that she had been raped by petitioner some six months before the crime for which he was on trial. Petitioner had never been tried for the alleged rape of Ms. Elrod. Moreover, the trial court did not instruct the jury that it had to find, by any particular standard of proof, that petitioner had raped Ms. Elrod before it could consider the evidence in determining his sentence. In short, the jury was presented with unproved but highly prejudicial allegations of criminal conduct, and was given no guidance on how to consider these allegations in determining whether death was an appropriate punishment. As in *Williams*, I maintain serious doubts whether the introduction of such evidence can be reconciled with the heightened need for reliability in death sentencing proceedings. I would therefore grant the petition for certiorari.

Rehearing Denied

No. 86–6846. CLEVELAND *v.* WARDEN, MARYLAND HOUSE OF CORRECTIONS, *ante*, p. 833;

No. 86–6863. ROCHON *v.* ACADIA PARISH SHERIFF DEPARTMENT ET AL., *ante*, p. 834; and

No. 87–5232. WILLIAMS *v.* JOINER, *ante*, p. 865. Petitions for rehearing denied.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Justice Powell (retired) to perform judicial duties in the United States Court of Appeals for the Fourth Circuit during the period of January 4 through January 8, 1988, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294(a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

NOVEMBER 10, 1987

Miscellaneous Order

No. A–374. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* DEMPS. Application of the Attorney General of Florida for an order to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eleventh Circuit, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied.

NOVEMBER 13, 1987

Dismissal Under Rule 53

No. 87–542. PARKVIEW ASSOCIATES *v.* CITY OF NEW YORK ET AL. Appeal from App. Div., Sup. Ct. N. Y., 1st Jud. Dept., dismissed under this Court's Rule 53. Reported below: 129 App. Div. 2d 405, 513 N. Y. S. 2d 342.

NOVEMBER 16, 1987

Appeals Dismissed

No. 87–10. BOCLAIR ET AL. *v.* ILLINOIS. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Reported below: 119 Ill. 2d 368, 519 N. E. 2d 437.

No. 87–531. ASAM *v.* LEE COUNTY DISTRICT SCHOOL BOARD ET AL. Appeal from C. A. 11th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 816 F. 2d 686.

No. 87–5539. ADAMS *v.* FLORIDA. Appeal from Dist. Ct. App. Fla., 1st Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 508 So. 2d 1239.

No. 87–608. PEDERSON *v.* SHULMAN. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Reported below: 815 F. 2d 714.

No. 87–5547. FISCHER *v.* MICHIGAN. Appeal from Sup. Ct. Mich. dismissed for want of jurisdiction.

Miscellaneous Orders

No. A–337. WILLIAMS *v.* MINNESOTA LAWYERS PROFESSIONAL RESPONSIBILITY BOARD. Application for temporary restraining order, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–345 (87–454). DOMINICAN REPUBLIC ET AL. *v.* MEADOWS, DECEASED, ET AL. C. A. 9th Cir. Application for stay, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. D–651. IN RE DISBARMENT OF RIGOLOSI. Disbarment entered. [For earlier order herein, see 483 U. S. 1051.]

No. 86–1034. VIRGINIA *v.* AMERICAN BOOKSELLERS ASSN., INC., ET AL. C. A. 4th Cir. [Probable jurisdiction noted, 479 U. S. 1082.] Motion of appellees for leave to file a supplemental brief after argument granted.

No. 86–1172. GOODYEAR ATOMIC CORP. *v.* MILLER ET AL. Sup. Ct. Ohio. [Probable jurisdiction noted, 483 U. S. 1004.] Motion of Oil, Chemical & Atomic Workers International Union for leave to file a brief as *amicus curiae* granted.

No. 86–1357. UNITED STATES DEPARTMENT OF JUSTICE ET AL. *v.* JULIAN ET AL. C. A. 9th Cir. [Certiorari granted, 482 U. S. 926.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 86-1415. MARINO ET AL. *v.* ORTIZ ET AL.; and COSTELLO ET AL. *v.* NEW YORK CITY POLICE DEPARTMENT ET AL. C. A. 2d Cir. [Certiorari granted, 481 U. S. 1047 and 482 U. S. 912.] Motion of the Solicitor General to permit Glen D. Nager, Esq., to present oral argument *pro hac vice* granted.

No. 86-7009. IN RE SHIBUYA;

No. 86-7012. IN RE SHIBUYA; and

No. 87-5032. IN RE SHIBUYA, *ante*, p. 811. Motion of petitioner for reconsideration of order denying motions for leave to proceed *in forma pauperis* denied.

No. 87-170. COPLEY ET AL. *v.* HEIL-QUAKER CORP. ET AL. Appeal from C. A. 6th Cir. Motion of appellants to expedite consideration and/or to consolidate this case with No. 87-367, *Bendix Autolite Corp.* v. *Midwesco Enterprises, Inc.* [probable jurisdiction noted, *ante*, p. 923], denied.

No. 87-5489. BENNETT *v.* NORTH AMERICAN VAN LINES ET AL. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until December 7, 1987, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 87-580. IN RE POLYAK. C. A. 6th Cir. Petition for writ of common-law certiorari denied. Reported below: 810 F. 2d 203.

Certiorari Granted

No. 87-505. CHICK KAM CHOO ET AL. *v.* EXXON CORP. ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 817 F. 2d 307.

Certiorari Denied. (See also Nos. 87-531, 87-5539, and 87-580, *supra*.)

No. 86-2003. BRAUNER *v.* MCCONNELL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 815 F. 2d 701.

No. 86–2029. DUNLAP *v.* UNIVERSITY OF KENTUCKY. C. A. 6th Cir. Certiorari denied. Reported below: 815 F. 2d 702.

No. 86–7077. DAINWOOD *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 87–138. NICOLOSI ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 817 F. 2d 752.

No. 87–224. DOW CHEMICAL CO. ET AL. *v.* RYAN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 821 F. 2d 139.

No. 87–297. PORT AUTHORITY POLICE BENEVOLENT ASSN., INC., ET AL. *v.* PORT AUTHORITY OF NEW YORK AND NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 819 F. 2d 413.

No. 87–351. STEARNS CO. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 816 F. 2d 279.

No. 87–374. CHOTIN TRANSPORTATION, INC. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 819 F. 2d 1342.

No. 87–403. FEDERAL PACIFIC ELECTRIC CO., INC. *v.* DIGHTON ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 399 Mass. 687, 506 N. E. 2d 509.

No. 87–468. AUSTIN *v.* BVA CREDIT CORP., AKA BANK OF VIRGINIA. C. A. 11th Cir. Certiorari denied. Reported below: 818 F. 2d 873.

No. 87–472. RICHARDSON ET AL. *v.* LANE ET AL. Int. Ct. App. Haw. Certiorari denied. Reported below: 6 Haw. App. 614, 736 P. 2d 63.

No. 87–484. VATICAN SHRIMP CO., INC. *v.* SOLIS. C. A. 5th Cir. Certiorari denied. Reported below: 820 F. 2d 674.

No. 87–486. TAYLOR ET AL. *v.* HUDSON PULP & PAPER CORP. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 788 F. 2d 1455.

No. 87–488. NATIONAL MARINE SERVICES, INC., ET AL. *v.* SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA. C. A. 5th Cir. Certiorari denied. Reported below: 820 F. 2d 148.

No. 87–489. COHERENT, INC. *v.* SPECTRA-PHYSICS, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 827 F. 2d 1524.

No. 87–490. ARONSON *v.* ILLINOIS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 815 F. 2d 709.

No. 87–491. WILLIAMS ET AL. *v.* BAXTER. C. A. 9th Cir. Certiorari denied. Reported below: 812 F. 2d 421.

No. 87–497. FELDMAN ET AL. *v.* PIONEER PETROLEUM, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 813 F. 2d 296.

No. 87–507. PALM BEACH NEWSPAPERS, INC. *v.* BURK, JUDGE, CIRCUIT COURT OF FLORIDA, PALM BEACH COUNTY, ET AL.; and

No. 87–508. MIAMI HERALD PUBLISHING CO. *v.* BURK, JUDGE, CIRCUIT COURT OF FLORIDA, PALM BEACH COUNTY, ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 504 So. 2d 378.

No. 87–514. HOOPER ET AL. *v.* SACHS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 823 F. 2d 547.

No. 87–516. ROMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 822 F. 2d 261.

No. 87–518. HAGAR *v.* NATIONAL RAILROAD PASSENGER CORPORATION. C. A. 2d Cir. Certiorari denied. Reported below: 822 F. 2d 1261.

No. 87–530. JOSEPH O. FAWCETT & SONS, INC., ET AL. *v.* UNION PACIFIC RAILROAD CO. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 820 F. 2d 338.

No. 87–533. STEVER *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 107 N. J. 543, 527 A. 2d 408.

No. 87–539. ROBERTSON *v.* CITY OF LOUISVILLE, BY AND THROUGH THE URBAN RENEWAL AND COMMUNITY DEVELOPMENT AGENCY OF LOUISVILLE. Ct. App. Ky. Certiorari denied.

No. 87–554. OKLAHOMA *v.* TODD. Ct. Crim. App. Okla. Certiorari denied.

No. 87–559. RAMSUNDAR *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 204 Conn. 4, 526 A. 2d 1311.

No. 87–565. HASTON *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 24 M. J. 313.

No. 87–577. ANDERSON ET AL. *v.* STATE OIL AND GAS BOARD OF ALABAMA ET AL. Ct. Civ. App. Ala. Certiorari denied. Reported below: 510 So. 2d 250.

No. 87–581. PAPPANIKOLAOU *v.* ADMINISTRATOR OF VETERANS ADMINISTRATION. C. A. 2d Cir. Certiorari denied. Reported below: 857 F. 2d 1461.

No. 87–582. ADMAN *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 826 F. 2d 1072.

No. 87–596. CHEEK *v.* DOE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 828 F. 2d 395.

No. 87–611. FEDERATION OF LORTON COMMUNITIES *v.* BARRY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 825 F. 2d 406.

No. 87–612. DEKLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 828 F. 2d 770.

No. 87–627. TOMASELLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 823 F. 2d 545.

No. 87–5054. COOK *v.* FORD, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 87–5102. LAGERQUIST *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 820 F. 2d 969.

No. 87–5143. COX *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 819 F. 2d 1139.

No. 87–5149. VLASAK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 817 F. 2d 753.

No. 87–5160. HINCAPIE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 813 F. 2d 1229.

No. 87–5163. WELCH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 817 F. 2d 273.

No. 87–5321. LEE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 818 F. 2d 1052.

No. 87–5351. PREISLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 819 F. 2d 1136.

No. 87–5389. SHUE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 825 F. 2d 1111.

No. 87–5525. ONTIVEROS *v.* SCHMIDT ET AL. C. A. 5th Cir. Certiorari denied.

No. 87–5530. LAUDERDALE *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA, ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 87–5533. DAVIS *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 823 F. 2d 546.

No. 87–5535. DINGLE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 130 App. Div. 2d 586, 514 N. Y. S. 2d 1015.

No. 87–5536. HINE *v.* STUTSMAN. Sup. Ct. Nev. Certiorari denied. Reported below: 103 Nev. 807.

No. 87–5541. SAVAGE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 825 F. 2d 408.

No. 87–5543. MCGOVERN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 822 F. 2d 739.

No. 87–5544. WOODS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 819 F. 2d 1147.

No. 87–5548. LEVINSON *v.* LITTON SYSTEMS, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 826 F. 2d 1072.

No. 87–5549. DICKERSON *v.* LOUISIANA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 816 F. 2d 220.

No. 87–5551. BAYLIS *v.* BUTLER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 87–5559. ZENDEJAS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 87–5563. WARD *v.* THIERET, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 822 F. 2d 1091.

No. 87–5566. BROWN *v.* RYAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 87–5572. HUSKEY *v.* KENTUCKY ET AL. Cir. Ct. Warren County, Ky. Certiorari denied.

No. 87–5577. MARTIN *v.* COHN, SUPERINTENDENT, INDIANA STATE REFORMATORY. C. A. 7th Cir. Certiorari denied.

No. 87–5579. WILLIAMS *v.* CADILLAC INSURANCE CO. ET AL. C. A. 6th Cir. Certiorari denied.

No. 87–5582. LEBLANC *v.* NEVADA. C. A. 9th Cir. Certiorari denied.

No. 87–5584. RUFFIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 826 F. 2d 1057.

No. 87–5588. RAMIREZ-RIOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 824 F. 2d 360.

No. 87–5591. HAWKINS *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 87–5594. LENTZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 823 F. 2d 867.

No. 87–5597. JENNINGS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 810 F. 2d 206.

No. 87–5598. CAUCHON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 824 F. 2d 908.

No. 87–5601. BROWN *v.* LUTHER, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 810 F. 2d 1160.

No. 87–5602. ABDOUCH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 824 F. 2d 1294.

No. 87–5604. BUFORD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 826 F. 2d 1068.

No. 87–5616. HILL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 825 F. 2d 408.

No. 87–5618. BINDER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 819 F. 2d 1146.

No. 87–5636. LEIGHT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 818 F. 2d 1297.

No. 87–5644. LUNZ *v.* HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 87–5650. LEVINE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 825 F. 2d 408.

No. 87–5654. STANGE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 826 F. 2d 619.

No. 87–5657. RODRIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 827 F. 2d 766.

No. 87–5662. LIVOY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 829 F. 2d 33.

No. 87–5664. COHAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 829 F. 2d 32.

No. 87–5668. FLAKES *v.* WISCONSIN. Ct. App. Wis. Certiorari denied.

No. 87–5671. BERTRAM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 828 F. 2d 770.

No. 87–5681. NERSESIAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 824 F. 2d 1294.

No. 87–120. FOLTZ, WARDEN *v.* HOPSON. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 818 F. 2d 866.

No. 87–162. NEW MEXICO *v.* HENSEL. Ct. App. N. M. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 106 N. M. 8, 738 P. 2d 126.

No. 87–555. OHIO *v.* ROGERS, AKA HUDSON. Sup. Ct. Ohio. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 32 Ohio St. 3d 70, 512 N. E. 2d 581.

No. 87–509. PALM BEACH NEWSPAPERS, INC. *v.* HAGLER ET AL.; and PALM BEACH NEWSPAPERS, INC. *v.* FLORIDA; and

No. 87–510. MIAMI HERALD PUBLISHING CO. *v.* HAGLER ET AL.; and MIAMI HERALD PUBLISHING CO. *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Motion of respondent John W. Hagler for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 471 So. 2d 1344 (first cases); 473 So. 2d 274 (second cases).

No. 87–5528. SMITH *v.* OKLAHOMA. Ct. Crim. App. Okla.;

No. 87–5538. JONES *v.* BAIR, SUPERINTENDENT, MECKLENBURG CORRECTIONAL CENTER. Sup. Ct. Va.; and

No. 87–5562. ZUNIGA *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: No. 87–5528, 737 P. 2d 1206; No. 87–5562, 320 N. C. 233, 357 S. E. 2d 898.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 86–1899. POLYAK *v.* STACK ET AL., *ante*, p. 801;

No. 86–1933. HELLER *v.* CONSOLIDATED RAIL CORPORATION ET AL., *ante*, p. 824;

No. 86–2071. VERDERBER *v.* CANTELLO PLUMBING CORP., *ante*, p. 831;

No. 86–6705. BALL *v.* WHITE, WARDEN, ET AL., *ante*, p. 832;

No. 86–6907. BRUMBAUGH *v.* BRUMBAUGH, *ante*, p. 834;

No. 86–6941. BYRD *v.* MISSOURI, *ante*, p. 872;

No. 86–6982. HADDIX *v.* CITY OF DAYTON, *ante*, p. 837;

No. 86–7016. REITER *v.* CROSIER ET AL., *ante*, p. 839;

No. 86–7020. BROWN *v.* DYKE ET AL., *ante*, p. 839;

No. 86–7047. HAYWOOD *v.* MASSEY ET AL., *ante*, p. 840;

No. 86–7058. WITHERSPOON *v.* W. R. GRACE & CO., *ante*, p. 841;

No. 86–7119. LATSHAW *v.* MCA, INC., *ante*, p. 843;

No. 87–128. POSTEL *v.* TEXAS WATER DEVELOPMENT BOARD ET AL., *ante*, p. 851;

No. 87–177. QUAST *v.* QUAST, *ante*, p. 853;

No. 87–5273. NAKAGAWA *v.* COLORADO, *ante*, p. 803; and

No. 87–5435. IN RE CALLANAN, *ante*, p. 894. Petitions for rehearing denied.

NOVEMBER 23, 1987

Dismissal Under Rule 53

No. 87–376. LOS ANGELES MEMORIAL COLISEUM COMMISSION *v.* NATIONAL BASKETBALL ASSN. ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 815 F. 2d 562.

NOVEMBER 30, 1987

Appeals Dismissed

No. 87–340. WYANT *v.* PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES ET AL. Appeal from Pa. Commw. Ct. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 87–588. PEABODY COAL CO. *v.* STATE TAX COMMISSION OF MISSOURI ET AL. Appeal from Sup. Ct. Mo. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 731 S. W. 2d 837.

No. 87–5634. WOOL *v.* RICHARDSON ET AL. Appeal from Ct. Sp. App. Md. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 87–579. KATZ *v.* NEW YORK. Appeal from App. Term, Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of substantial federal question. Reported below: 135 Misc. 2d 857, 518 N. Y. S. 2d 721.

No. 87–625. SCHAPIRO *v.* HERITAGE MUTUAL INSURANCE CO. Appeal from Ct. App. Wis. dismissed for want of substantial federal question. Reported below: 140 Wis. 2d 868, 412 N. W. 2d 902.

No. 87–637. GREEN *v.* FRANKLIN. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question.

No. 87–5596. ARMSTRONG *v.* ARMSTRONG. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of substantial federal question.

No. 87–5587. MURPHY *v.* AETNA LIFE & CASUALTY ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Reported below: 815 F. 2d 714.

Miscellaneous Orders

No. A–342 (87–731). GLOBE NEWSPAPER CO. ET AL. *v.* KING. Sup. Jud. Ct. Mass. Motion of respondent to vacate the stay granted by JUSTICE BRENNAN denied.

No. D–650. IN RE DISBARMENT OF SLOTKIN. Disbarment entered. [For earlier order herein, see 483 U. S. 1051.]

No. D–663. IN RE DISBARMENT OF CIARDELLI. It is ordered that Victor F. Ciardelli, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 110, Orig. IN RE REPUBLIC OF SURINAME EX REL. BOERENVEEN. Motion for leave to file petition for writ of habeas corpus denied.

No. 86–1034. VIRGINIA *v.* AMERICAN BOOKSELLERS ASSN., INC., ET AL. C. A. 4th Cir. [Probable jurisdiction noted, 479 U. S. 1082.] Motion of appellant for leave to file a supplemental brief after argument granted.

No. 86–6139. WATSON *v.* FORT WORTH BANK & TRUST. C. A. 5th Cir. [Certiorari granted, 483 U. S. 1004.] Motion of Texas for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 87–333. DELTA AIR LINES, INC. *v.* PORT AUTHORITY OF NEW YORK AND NEW JERSEY. C. A. 2d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 87–5454. WRENN *v.* GOULD ET AL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until December 21, 1987, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 87–5772. LEWIS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Motion of petitioners to expedite consideration of the petition for writ of certiorari denied.

No. 87–5569. IN RE ABRAHAM; and
No. 87–5586. IN RE MCCOLLUM. Petitions for writs of mandamus denied.

No. 87–714. IN RE BRANSON. C. A. 9th Cir. Petition for writ of mandamus or certiorari denied. Reported below: 817 F. 2d 106.

Certiorari Granted

No. 86–2037. LANDERS *v.* NATIONAL RAILROAD PASSENGER CORPORATION ET AL. C. A. 1st Cir. Certiorari granted. Reported below: 814 F. 2d 41.

No. 87–339. CITY OF NEW YORK ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 259 U. S. App. D. C. 191, 814 F. 2d 720.

No. 87–363. FEDERAL ENERGY REGULATORY COMMISSION *v.* MARTIN EXPLORATION MANAGEMENT CO. ET AL.; and
No. 87–364. PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK ET AL. *v.* MARTIN EXPLORATION MANAGEMENT CO. ET AL. C. A. 10th Cir. Motions of Williams Natural Gas Co. and Interstate Natural Gas Association for leave to file briefs as *amici curiae* in No. 87–363 granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 813 F. 2d 1059.

Certiorari Denied. (See also Nos. 87–340, 87–588, 87–5634, and 87–714, *supra*.)

No. 86–7147. MACLIN *v.* MOBILE CONSORTIUM ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 811 F. 2d 610.

No. 87–135. ENSIGN ET VIR *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 147 Ill. App. 3d 1164, 512 N. E. 2d 140.

No. 87–222. SILVER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 151 Ill. App. 3d 156, 502 N. E. 2d 1141.

No. 87–250. REAL, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA *v.* YAGMAN. C. A. 9th Cir. Certiorari denied. Reported below: 815 F. 2d 575.

No. 87–268. BAKER *v.* DEPARTMENT OF THE NAVY. C. A. 9th Cir. Certiorari denied. Reported below: 814 F. 2d 1381.

No. 87–341. CAMPBELL ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 813 F. 2d 694.

No. 87–346. FERNANDEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 822 F. 2d 382.

No. 87–373. TRANSAMERICA AIRLINES, INC. *v.* AIR LINE PILOTS ASSN., INTERNATIONAL. C. A. 9th Cir. Certiorari denied. Reported below: 817 F. 2d 510.

No. 87–395. ROE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 263 U. S. App. D. C. 357, 825 F. 2d 494.

No. 87–407. OFSHE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 817 F. 2d 1508.

No. 87–445. ALLISON *v.* HAMILTON. C. A. 9th Cir. Certiorari denied. Reported below: 823 F. 2d 554.

No. 87–448. HESTER, AGENT-IN-CHARGE, WESTERN DISTRICT, TENNESSEE ALCOHOLIC BEVERAGE COMMISSION *v.* MCGEE, DBA THE LIQUOR CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 815 F. 2d 1193.

No. 87–455. NAKASHIAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 820 F. 2d 549.

No. 87–458. NIEVES ET AL. *v.* HESS OIL VIRGIN ISLANDS CORP. C. A. 3d Cir. Certiorari denied. Reported below: 819 F. 2d 1237.

No. 87–495. ADKINS *v.* SEABOARD SYSTEM RAILROAD. C. A. 6th Cir. Certiorari denied. Reported below: 821 F. 2d 340.

No. 87–512. BERRY'AN *v.* HUGHES AIRCRAFT CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 813 F. 2d 1230.

No. 87–520. HANCICH *v.* GOPOIAN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 815 F. 2d 883.

No. 87–524. RUDOLPH *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 507 So. 2d 1072.

No. 87–538. SIMPSON ET AL. *v.* LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT. Sup. Ct. Ky. Certiorari denied. Reported below: 730 S. W. 2d 939.

No. 87–540. GENERAL ADMINISTRATION OF CIVIL AVIATION OF THE PEOPLES REPUBLIC OF CHINA *v.* BARKANIC, PERSONAL REPRESENTATIVE OF THE ESTATE OF BARKANIC, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 822 F. 2d 11.

No. 87–541. DANBURY, INC. *v.* OLIVE, DIRECTOR, BUREAU OF INTERNAL REVENUE, GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 820 F. 2d 618.

No. 87–546. UNITED AUTO WORKERS, LOCAL 422 *v.* TOSTI. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 400 Mass. 224, 508 N. E. 2d 1368.

No. 87–547. STATE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES OF KANSAS *v.* AMERICARE PROPERTIES, INC., DBA RUSSELL KARE CENTER ET AL. Sup. Ct. Kan. Certiorari denied. Reported below: 241 Kan. 607, 738 P. 2d 450.

No. 87–550. HORWITZ *v.* BOARD OF MEDICAL EXAMINERS OF COLORADO ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 822 F. 2d 1508.

No. 87–552. LARY *v.* ANSARI ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 817 F. 2d 1521.

No. 87–556. LEIGHTON *v.* UNIROYAL, INC., ET AL. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 216 N. J. Super. 363, 523 A. 2d 1078.

No. 87–558. HENN ET AL. *v.* NATIONAL GEOGRAPHIC SOCIETY. C. A. 7th Cir. Certiorari denied. Reported below: 819 F. 2d 824.

No. 87–561. INSURANCE COMPANY OF NORTH AMERICA *v.* GLOBE TANKERS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 820 F. 2d 546.

No. 87–568. LOESCH *v.* HECK. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 87–569. DAVIS *v.* EXXON CORP. Ct. App. Tex., 9th Dist. Certiorari denied.

No. 87–572. FLORIDA ET AL. *v.* COLEMAN ET AL. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 505 So. 2d 668.

No. 87–574. DECINTIO *v.* WESTCHESTER COUNTY MEDICAL CENTER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 821 F. 2d 111.

No. 87–575. MORSE ET AL. *v.* THE DAILY PRESS, INC. C. A. 4th Cir. Certiorari denied. Reported below: 826 F. 2d 1351.

No. 87–587. SCOTT, DIRECTOR, ARKANSAS DEPARTMENT OF HUMAN SERVICES, ET AL. *v.* DRAKE. C. A. 8th Cir. Certiorari denied. Reported below: 812 F. 2d 395 and 823 F. 2d 239.

No. 87–594. LOVELACE *v.* ACME MARKETS, INC. C. A. 3d Cir. Certiorari denied. Reported below: 820 F. 2d 81.

No. 87–623. HENSLEY *v.* STANLEY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 818 F. 2d 646.

No. 87–667. SMITH *v.* UNITED STATES MERIT SYSTEMS PROTECTION BOARD, OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 824 F. 2d 977.

No. 87–688. ZEMSKY *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 821 F. 2d 148.

No. 87–749. PEACOCK *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 24 M. J. 410.

No. 87–5039. MOORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 817 F. 2d 1105.

No. 87–5137. MCCULLUM *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 87–5147. MILLS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 820 F. 2d 1229.

No. 87–5179. CALLES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 818 F. 2d 869.

No. 87–5244. PENA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 820 F. 2d 1229.

No. 87–5251. LEE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 817 F. 2d 268.

No. 87–5295. JEWELL *v.* KASSULKE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 819 F. 2d 289.

No. 87–5316. DAVIS *v.* XEROX CORP. C. A. 9th Cir. Certiorari denied. Reported below: 811 F. 2d 1293.

No. 87–5365. SMITH *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 83 Ore. App. 151, 728 P. 2d 1386.

No. 87–5402. MORENO MORALES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 815 F. 2d 725.

No. 87–5413. SALVADOR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 820 F. 2d 558.

No. 87–5440. KELLY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 820 F. 2d 1173.

No. 87–5526. MAHDAVI *v.* DIRECTOR, VETERANS ADMINISTRATION. C. A. 9th Cir. Certiorari denied. Reported below: 815 F. 2d 1493.

No. 87–5545. BAIG *v.* UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE. C. A. 4th Cir. Certiorari denied. Reported below: 826 F. 2d 1059.

No. 87–5573. BURY *v.* CITY OF LAKELAND, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 87–5574. BRUCE *v.* LUKE V. BELLANGER, INC. C. A. 5th Cir. Certiorari denied. Reported below: 818 F. 2d 864.

No. 87–5576. RIOS *v.* VETERANS ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 826 F. 2d 1072.

No. 87–5590. BROWN *v.* GEORGIA. C. A. 11th Cir. Certiorari denied. Reported below: 828 F. 2d 774.

No. 87–5608. IN RE KOCHEL. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 35.

No. 87–5610. WESLEY *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 428 Mich. 708, 411 N. W. 2d 159.

No. 87–5611. DEL RIO *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 819 F. 2d 1148.

No. 87–5612. TROTZ *v.* PENNSYLVANIA PUBLIC SCHOOL EMPLOYEES RETIREMENT BOARD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 826 F. 2d 1057.

No. 87–5614. DAVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 828 F. 2d 18.

No. 87–5615. HARPOOL *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 87–5622. BOUGHER *v.* UNIVERSITY OF PITTSBURGH ET AL. C. A. 3d Cir. Certiorari denied.

No. 87–5623. EASTER *v.* ALLSBROOK ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 820 F. 2d 1219.

No. 87–5624. AUGUST *v.* CITY OF LOS ANGELES ET AL. C. A. 9th Cir. Certiorari denied.

No. 87–5626. BECKER *v.* BURGER KING CORP. C. A. 2d Cir. Certiorari denied. Reported below: 816 F. 2d 669.

No. 87–5629. TRISTAN *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 87–5630. THOMAS *v.* NEWSOME, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 821 F. 2d 1550.

No. 87–5631. SCHUETTE, AKA AGELINI *v.* GIESEN. C. A. 7th Cir. Certiorari denied.

No. 87–5632. MINGLEDOLPH *v.* MCKEAN, CHAIRMAN OF THE POSTAL BOARD, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 830 F. 2d 195.

No. 87–5633. MOTTON *v.* UNION PLANTERS NATIONAL BANK. Ct. App. Tenn. Certiorari denied.

No. 87–5637. CHAREST *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 528 A. 2d 465.

No. 87–5639. STRICKLAND *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 241 Kan. 426, 738 P. 2d 830.

No. 87–5640. MCGLORY *v.* YOKA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 829 F. 2d 31.

No. 87–5642. JOHNSON ET AL. *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 512 So. 2d 1246.

No. 87–5643. WILSON *v.* MORGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 826 F. 2d 1066.

No. 87–5645. ROSENFELD *v.* DUNHAM, SUPERINTENDENT, ARTHUR KILL CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 820 F. 2d 52.

No. 87–5649. ZINK *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 87–5663. KENYATTA *v.* MUNCY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 831 F. 2d 290.

No. 87–5682. MARTINEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 87–5684. VARGAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 831 F. 2d 283.

No. 87–5685. BROWN *v.* EVANS ET AL. C. A. 11th Cir. Certiorari denied.

No. 87–5694. WELLMAN *v.* REES, SUPERINTENDENT, KENTUCKY STATE REFORMATORY. C. A. 6th Cir. Certiorari denied. Reported below: 819 F. 2d 290.

No. 87–5696. JOHNSTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 87–5704. WALTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 37.

No. 87–5705. PATTEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 826 F. 2d 198.

No. 87–5710. POWELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 823 F. 2d 996.

No. 87–5711. TAYLOR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 829 F. 2d 33.

No. 87–5718. MINER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 823 F. 2d 545.

No. 87–5720. MEREDITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 824 F. 2d 1418.

No. 87–5727. AYARZA-GARCIA ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 819 F. 2d 1043.

No. 87–5740. COOPER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 87–5741. JONES ET AL. *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 85 N. C. App. 56, 354 S. E. 2d 251.

No. 87–5749. SALAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 824 F. 2d 751.

No. 87–5756. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 829 F. 2d 1131.

No. 87–5759. GIRALDO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 822 F. 2d 205.

No. 87–5763. HAZELTINE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 830 F. 2d 1127.

No. 87–5780. GIFFORD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 827 F. 2d 773.

No. 87–571. CITY OF LONG BEACH ET AL. *v.* EXXON CORP. ET AL. Temp. Emerg. Ct. App. Petition for writ of certiorari, mandamus, and prohibition denied. Reported below: 830 F. 2d 198.

No. 87–5105. HARPER, A MINOR, BY HER MOTHER AND NEXT FRIEND, HARPER *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 813 F. 2d 737.

No. 87–5613. WILLIAMS *v.* HEVI-DUTY ELECTRIC CO. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 819 F. 2d 620.

No. 87–5354. JAMES *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 87–5482. CHILDS *v.* GEORGIA. Sup. Ct. Ga.;
No. 87–5567. BROWN *v.* NORTH CAROLINA. Sup. Ct. N. C.;
No. 87–5568. CARTER *v.* TEXAS. Ct. Crim. App. Tex.;
No. 87–5607. HALVORSEN *v.* KENTUCKY. Sup. Ct. Ky.; and
No. 87–5688. SNOW *v.* SUMNER, DIRECTOR, NEVADA DEPARTMENT OF PRISONS. Sup. Ct. Nev. Certiorari denied. Reported below: No. 87–5354, 736 P. 2d 541; No. 87–5482, 257 Ga. 243, 357 S. E. 2d 48; No. 87–5567, 320 N. C. 179, 358 S. E. 2d 1; No. 87–5568, 717 S. W. 2d 60; No. 87–5607, 730 S. W. 2d 921; No. 87–5688, 103 Nev. 820.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 87–5660. CORDEIRO *v.* CONNER ET AL. Sup. Ct. Ariz. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

Rehearing Denied

No. 86–1710. KNAPP *v.* ARIZONA, *ante*, p. 816;
No. 86–1888. MARTINELLI, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF MARTINELLI, ET AL. *v.* UNITED STATES DEPARTMENT OF THE ARMY, *ante*, p. 822;
No. 86–1891. HALLIWELL *v.* EU, SECRETARY OF STATE OF CALIFORNIA, ET AL., *ante*, p. 801;
No. 86–1905. BRUMFIELD *v.* UNITED STATES, *ante*, p. 822;
No. 86–1911. CASA LINDA PRESBYTERIAN CHURCH IN AMERICA ET AL. *v.* GRACE UNION PRESBYTERY, INC., ET AL., *ante*, p. 823;
No. 86–1912. TOTUS ET AL. *v.* HOLLY ET AL., *ante*, p. 823;
No. 86–1988. TORRES *v.* STATE BOARD OF LAW EXAMINERS OF ILLINOIS, *ante*, p. 827;

No. 86–2005. CASEY ET AL. *v.* TENNESSEE, *ante*, p. 828;

No. 86–2017. HOLDING *v.* SOVRAN BANK ET AL., *ante*, p. 828;

No. 86–2049. BAYER *v.* JOHNSON, SECRETARY OF REVENUE OF SOUTH DAKOTA, *ante*, p. 830;

No. 86–2050. JOHNSON ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 830;

No. 86–2066. YASUI ET AL. *v.* UNITED STATES, *ante*, p. 831;

No. 86–6716. NEELY *v.* UNITED STATES, *ante*, p. 832;

No. 86–6922. COMSIA *v.* MANGNONE ET AL., *ante*, p. 835;

No. 86–6933. JEFFERSON *v.* GEORGIA, *ante*, p. 872;

No. 86–6951. LYONS *v.* SCOTT ET AL., *ante*, p. 836;

No. 86–6953. THOMPSON *v.* ALABAMA, *ante*, p. 872;

No. 86–7082. MAY *v.* TEXAS, *ante*, p. 872;

No. 86–7089. SMITH *v.* UNITED STATES, *ante*, p. 842;

No. 86–7093. WABEKE *v.* MUTUAL HOME FEDERAL SAVINGS & LOAN ASSN. ET AL., *ante*, p. 842;

No. 86–7138. SPIGELSKI *v.* PITTSBURGH HUMAN RELATIONS COMMISSION, *ante*, p. 844;

No. 86–7162. JOUBERT *v.* NEBRASKA, *ante*, p. 905;

No. 87–2. VAHLSING *v.* BANGOR & AROOSTOOK RAILROAD CO. ET AL., *ante*, p. 845;

No. 87–9. MCDONNELL DOUGLAS CORP. *v.* WORKERS' COMPENSATION APPEALS BOARD OF CALIFORNIA ET AL., *ante*, p. 845;

No. 87–46. FONDO *v.* SHEINDLIN, INDIVIDUALLY AND AS JUDGE OF THE FAMILY COURT OF THE STATE OF NEW YORK, BRONX COUNTY, ET AL., *ante*, p. 847;

No. 87–53. KRILETICH *v.* COMMISSION ON JUDICIAL PERFORMANCE ET AL., *ante*, p. 848;

No. 87–91. BREWSTER *v.* MOUNT VERNON HOSPITAL ET AL., *ante*, p. 849;

No. 87–190. MARTIN *v.* ST. JOE CONTAINER CO., *ante*, p. 853;

No. 87–195. PENK ET AL. *v.* OREGON STATE BOARD OF HIGHER EDUCATION, *ante*, p. 853;

No. 87–207. KERR *v.* PENNSYLVANIA, *ante*, p. 854;

No. 87–229. KING *v.* CALIFORNIA ET AL., *ante*, p. 802;

No. 87–288. SAMPANG *v.* MARSH ET AL., *ante*, p. 855;

No. 87–304. LEIGHTON *v.* BEATRICE COS., INC., ET AL., *ante*, p. 898;

No. 87–5021. EASLEY *v.* KOSCINSKI ET AL., *ante*, p. 857;

No. 87–5023. VAN SANT *v.* ARLINGTON COUNTY, VIRGINIA, *ante*, p. 857;

No. 87–5062. WILLIAMS *v.* GEORGIA, *ante*, p. 803;
No. 87–5082. HORTON *v.* GEORGIA, *ante*, p. 905;
No. 87–5117. FELDE *v.* BUTLER, WARDEN, *ante*, p. 873;
No. 87–5151. KOST *v.* CAPITOL CORP. ET AL., *ante*, p. 863;
No. 87–5181. GRANT *v.* NEW YORK, *ante*, p. 864;
No. 87–5189. WILLIAMS *v.* UNITED STATES POSTAL SERVICE ET AL., *ante*, p. 864;
No. 87–5191. HOWARD *v.* DAVIS ET AL., *ante*, p. 864;
No. 87–5212. ABRAHAM *v.* WHITE, WARDEN, *ante*, p. 915;
No. 87–5241. FLETCHER *v.* HOOD ET AL., *ante*, p. 899;
No. 87–5242. VAN SANT *v.* HUDSON ET AL., *ante*, p. 866;
No. 87–5258. SILAGY *v.* ILLINOIS, *ante*, p. 873;
No. 87–5300. TILLI *v.* SPAZIANI ET AL., *ante*, p. 900;
No. 87–5309. DE LA CERDA *v.* CHEMEKETA COMMUNITY COLLEGE DISTRICT ET AL., *ante*, p. 868;
No. 87–5318. HADDIX *v.* CITY OF DAYTON, OHIO, ET AL., *ante*, p. 901;
No. 87–5349. MURRAY *v.* PLAUT, ADMINISTRATOR, MAXIMUM SECURITY FACILITY, LORTON, VIRGINIA, *ante*, p. 902;
No. 87–5378. ANDREGG *v.* PACIFIC TELEPHONE & TELEGRAPH CO. ET AL., *ante*, p. 909;
No. 87–5394. OWENS *v.* FULCOMER, *ante*, p. 916; and
No. 87–5396. FELTON *v.* DIXON ET AL., *ante*, p. 916. Petitions for rehearing denied.

No. 87–40. ALLSTATE INSURANCE CO. *v.* HAWKINS ET UX., *ante*, p. 874. Petition for rehearing denied. JUSTICE STEVENS took no part in the consideration or decision of this petition.

No. 87–5409. MARTIN *v.* PENNSYLVANIA STATE REAL ESTATE COMMISSION ET AL., *ante*, p. 908. Petition for rehearing denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition.

DECEMBER 1, 1987

Assignment Order

Pursuant to the provisions of 28 U. S. C. § 42, it is ordered that JUSTICE STEVENS be, and he is hereby, assigned to the Eleventh Circuit as Circuit Justice, pending further order. The order of September 10, 1987 [483 U. S. 1053], assigning JUSTICE O'CONNOR to the Eleventh Circuit as Circuit Justice is vacated.

DECEMBER 7, 1987

Appeal Dismissed

No. 87–5669. ALBERTON *v.* STATE BAR OF CALIFORNIA. Appeal from Sup. Ct. Cal. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 43 Cal. 3d 638, 738 P. 2d 720.

Certiorari Granted—Vacated and Remanded

No. 87–635. OKLAHOMA TAX COMMISSION *v.* GRAHAM ET AL. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Caterpillar Inc.* v. *Williams*, 482 U. S. 386 (1987). Reported below: 822 F. 2d 951.

Miscellaneous Orders

No. — — ——. FISHER *v.* OKLAHOMA. Motion of petitioner for leave to proceed *in forma pauperis* without an affidavit of indigency executed by the petitioner granted.

No. D–652. IN RE DISBARMENT OF CONWAY. Disbarment entered. [For earlier order herein, see 483 U. S. 1051.]

No. D–664. IN RE DISBARMENT OF WITTMAACK. It is ordered that John A. Wittmaack, of Hawley, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–665. IN RE DISBARMENT OF ENRICO. It is ordered that Paul J. Enrico, of West Babylon, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 65, Orig. TEXAS *v.* NEW MEXICO. Report of the Special Master received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed by the parties within 45 days. Replies thereto, with supporting briefs, may be filed within 30 days. [For earlier decision herein, see, *e. g.*, 482 U. S. 124.]

No. 94, Orig. SOUTH CAROLINA *v.* BAKER, SECRETARY OF THE TREASURY. Motion for compensation on behalf of the Estate of the Special Master, Samuel J. Roberts, granted. [For earlier order herein, see, *e. g.*, *ante*, p. 920.]

No. 87–201. MANSELL *v.* MANSELL. Appeal from Ct. App. Cal., 5th App. Dist.; and

No. 87–609. SHELL OIL CO. *v.* DIRECTOR OF REVENUE OF MISSOURI. Appeal from Sup. Ct. Mo. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 87–5411. IN RE SHIBUYA, *ante*, p. 922. Motion of petitioner for reconsideration of the order of this Court denying the motion for leave to proceed *in forma pauperis* denied.

No. 87–5500. TILLER ET AL. *v.* NCNB BANK OF NORTH CAROLINA. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until December 28, 1987, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 87–5648. SHIBUYA *v.* VOSS ET AL. C. A. D. C. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until December 28, 1987, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of the Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 87–5659. TISCHIO *v.* NEW JERSEY. Appeal from Sup. Ct. N. J. Motion of appellant for leave to proceed *in forma pauperis* denied. Appellant is allowed until December 28, 1987, within which to pay the docketing fee required by Rule 45(a) and to submit a statement as to jurisdiction in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would dismiss the appeal for want of substantial federal question without reaching the merits of the motion to proceed *in forma pauperis*.

No. 87–5789 (A–383). IN RE SAFIR. Application for injunction, addressed to JUSTICE WHITE and referred to the Court, denied. Petition for writ of mandamus denied.

Certiorari Granted

No. 87–354. ARIZONA *v.* ROBERSON. Ct. App. Ariz. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted.

No. 87–416. UNITED STATES CATHOLIC CONFERENCE ET AL. *v.* ABORTION RIGHTS MOBILIZATION, INC., ET AL. C. A. 2d Cir. Motion of National Council of Churches of Christ in the U. S. A. et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. Reported below: 824 F. 2d 156.

No. 87–5367. MILLS *v.* MARYLAND. Ct. App. Md. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 310 Md. 33, 527 A. 2d 3.

Certiorari Denied. (See also No. 87–5669, *supra*.)

No. 86–1562. PAWTUXET COVE MARINA, INC., ET AL. *v.* CIBA-GEIGY CORP., INC. C. A. 1st Cir. Certiorari denied. Reported below: 807 F. 2d 1089.

No. 86–7094. LEON-MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 815 F. 2d 1493.

No. 86–7100. BANKS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 516 A. 2d 524.

No. 86–7109. DiGREGORIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 815 F. 2d 696.

No. 86–7143. ALBERTINI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 812 F. 2d 715.

No. 86–7160. DANCY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 728 S. W. 2d 772.

No. 87–260. GENERAL DYNAMICS LAND SYSTEMS, INC. *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 259 U. S. App. D. C. 369, 815 F. 2d 1570.

No. 87–273. ST. JOHN STEVEDORING CO., INC., ET AL. *v.* WILFRED; and

No. 87–381. JONES *v.* ST. JOHN STEVEDORING CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 818 F. 2d 397.

No. 87–330. MARTIN-MUSUMECI *v.* CRAMER ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 87–361. SLUGOCKI ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 816 F. 2d 1572.

No. 87–400. NUNEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 819 F. 2d 1136.

No. 87–415. NORTHERN PLAINS RESOURCE COUNCIL ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 817 F. 2d 758.

No. 87–454. DOMINICAN REPUBLIC ET AL. *v.* MEADOWS, DECEASED, ET AL.; and

No. 87–634. MEADOWS, DECEASED, ET AL. *v.* DOMINICAN REPUBLIC ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 817 F. 2d 517.

No. 87–478. POPOVICH ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 820 F. 2d 134.

No. 87–496. OVERTON *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 24 M. J. 309.

No. 87–563. KALVANS *v.* COURT OF APPEALS OF MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 87–564. LIGGETT GROUP, INC., ET AL. *v.* CIPOLLONE, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF CIPOLLONE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 822 F. 2d 335.

No. 87–584. WEBB *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 21 Ark. App. xx.

No. 87–586. MAALOUF ET AL. *v.* HADDAD ET AL. C. A. 9th Cir. Certiorari denied.

No. 87–591. POLLARD *v.* REA MAGNET WIRE CO., INC. C. A. 7th Cir. Certiorari denied. Reported below: 824 F. 2d 557.

No. 87–595. DEAN WITTER REYNOLDS, INC., ET AL. *v.* WEDERSKI. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 87–604. MCDERMOTT, INC., ET AL. *v.* SCHEXNIDER ET UX. C. A. 5th Cir. Certiorari denied. Reported below: 817 F. 2d 1159.

No. 87–617. LOONEY *v.* GRUNDY NATIONAL BANK ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 823 F. 2d 788.

No. 87–622. VALLEY LIQUORS, INC. *v.* RENFIELD IMPORTERS, LTD. C. A. 7th Cir. Certiorari denied. Reported below: 822 F. 2d 656.

No. 87–629. AMERICAN NATIONAL BANK & TRUST CO., AS TRUSTEE UNDER TRUST NUMBER 33832, ET AL. *v.* CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 826 F. 2d 1547.

No. 87–631. COASTAL CORP. ET AL. *v.* APEX OIL CO.; and
No. 87–633. APEX OIL CO. *v.* DIMAURO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 822 F. 2d 246.

No. 87–638. AUSTIN ET AL. *v.* TORRINGTON CO. C. A. 4th Cir. Certiorari denied. Reported below: 810 F. 2d 416.

No. 87–669. DAIGLE *v.* PATASCHNICK-HARRISON CONSTRUCTION CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 823 F. 2d 551.

No. 87–736. GELFAND, SURROGATE JUDGE, BRONX COUNTY *v.* NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT. Ct. App. N. Y. Certiorari denied. Reported below: 70 N. Y. 2d 211, 512 N. E. 2d 533.

No. 87–758. HOVATER *v.* EQUIFAX SERVICES, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 823 F. 2d 413.

No. 87–759. BURNS *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 25 M. J. 218.

No. 87–768. WILLIAMS *v.* FORD, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 819 F. 2d 1149.

No. 87–5167. DE LOS SANTOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 810 F. 2d 1326.

No. 87–5196. GONZALEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 819 F. 2d 1130.

No. 87–5350. BRYANT *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 217 N. J. Super. 72, 524 A. 2d 1291.

No. 87–5453. LAWSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 823 F. 2d 553.

No. 87–5472. PULEO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 817 F. 2d 702.

No. 87–5510. TURNER *v.* CITY OF LEBANON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 818 F. 2d 31.

No. 87–5651. LAWRENCE *v.* STOKES ET AL. C. A. 11th Cir. Certiorari denied.

No. 87–5653. BAKER *v.* CHAGRIN VALLEY MEDICAL CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 817 F. 2d 756.

No. 87–5656. BATTLE *v.* JONES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 819 F. 2d 1149.

No. 87–5658. MARQUEZ ET AL. *v.* TERRITORY OF GUAM. C. A. 9th Cir. Certiorari denied. Reported below: 816 F. 2d 684.

No. 87–5665. FREDERICK *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 823 F. 2d 556.

No. 87–5670. CRESPO *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 818 F. 2d 684.

No. 87–5678. SCOTT *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 510 N. E. 2d 170.

No. 87–5679. WOJTALEWICZ *v.* SHORTRIDGE ET AL. C. A. 8th Cir. Certiorari denied.

No. 87–5683. EDWARDS *v.* IOWA. Sup. Ct. Iowa. Certiorari denied.

No. 87–5687. CLEVELAND *v.* KUNKLE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 825 F. 2d 406.

No. 87–5689. RONZZO *v.* COTTRINGER ET AL. C. A. 8th Cir. Certiorari denied.

No. 87–5693. SOLOMON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 829 F. 2d 32.

No. 87–5695. JONES *v.* ROGERS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 35.

No. 87–5716. MULAZIM *v.* MICHIGAN DEPARTMENT OF CORRECTIONS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 826 F. 2d 1064.

No. 87–5721. BYNUM *v.* BUREAU OF PRISONS. C. A. 11th Cir. Certiorari denied.

No. 87–5723. VEAL *v.* ABBOTT, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 828 F. 2d 774.

No. 87–5750. COLANGELO *v.* DONAHUE, SUPERINTENDENT, ALTONA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 827 F. 2d 765.

No. 87–5778. RAWLINGS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 821 F. 2d 1543.

No. 87–5808. ROBLES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 825 F. 2d 152.

No. 87–5810. RICHARDSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 87–5820. GUZY *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 139 Wis. 2d 663, 407 N. W. 2d 548.

No. 86–1659. CONTINENTAL CAN CO. *v.* GAVALIK ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 812 F. 2d 834.

No. 87–557. FRESNO POLICE OFFICERS ASSN. ET AL. *v.* CALIFORNIA ET AL. Ct. App. Cal., 1st App. Dist. Certiorari de-

nied. JUSTICE WHITE would grant certiorari. Reported below: 190 Cal. App. 3d 413, 235 Cal. Rptr. 474.

No. 86-7164. MCDOWELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 814 F. 2d 245.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

In *Faretta* v. *California*, 422 U. S. 806 (1975), we held that an accused has a right to conduct his own defense. We also stated that, because an accused's election to do so "relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel," a defendant who chooses to proceed *pro se* may be allowed to do so only if he "'knowingly and intelligently' [chooses to] forgo those relinquished benefits." *Id.*, at 835. We stated that an accused wishing to be tried without counsel "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Ibid.*

Since *Faretta*, lower federal and state courts have sought to arrive at the proper balance between allowing an accused to exercise his right of self-representation, and at the same time, insuring that a waiver of a defendant's right to counsel is only made when "knowing and intelligent" and "with eyes open." In this case, for example, after petitioner indicated to the District Court his desire to present his own defense, the trial judge conducted a short colloquy with petitioner before allowing him to proceed *pro se*. On appeal, the Court of Appeals rejected petitioner's claim that this brief exchange with the trial judge was insufficient to establish that he had "knowingly and intelligently" waived his Sixth Amendment right to counsel. The Sixth Circuit concluded that "a fair reading of the record as a whole" established that petitioner elected to represent himself with "eyes open"; therefore it affirmed petitioner's conviction. 814 F. 2d 245, 249 (1987). The Court of Appeals, however, in the exercise of its supervisory powers, required district judges in the future to conduct a more detailed inquiry of a defendant—based on the model offered at 1 Bench Book for United States District Judges §§ 1.02-2—1.02-5 (3d ed. 1986)—before allowing an accused to waive his right to counsel, as this petitioner had. 814 F. 2d, at 250-251.

In reaching this decision, the Sixth Circuit followed the approach taken by the District of Columbia Circuit in *United States* v. *Bailey*, 219 U. S. App. D. C. 67, 75-76, 675 F. 2d 1292, 1300-

1301, cert. denied, 459 U. S. 853 (1982). It also rejected the position of the Third Circuit, which had reversed a conviction on facts similar to these, by interpreting *Faretta* to require a "searching inquiry" with an accused before allowing him to conduct his own defense. *United States* v. *Welty*, 674 F. 2d 185, 188–189 (1982); accord, *Piankhy* v. *Cuyler*, 703 F. 2d 728, 730–731 (CA3 1983). Two other Courts of Appeals have likewise read our decision in *Faretta* as requiring that a trial judge conduct a special "hearing to ensure that the accused understands the dangers and disadvantages of proceeding *pro se*." *United States* v. *Edwards*, 716 F. 2d 822, 824 (CA11 1983); accord, *United States* v. *Chaney*, 662 F. 2d 1148, 1152 (CA5 1981).

By contrast, four Courts of Appeals have taken the position that no specific inquiries or special hearings must be conducted before an accused's exercise of his *Faretta* rights will be considered "knowing and intelligent." *United States* v. *Hafen*, 726 F. 2d 21, 26 (CA1), cert. denied, 466 U. S. 962 (1984); *United States* v. *Kimmel*, 672 F. 2d 720, 721–722 (CA9 1982); *United States* v. *Trapnell*, 638 F. 2d 1016, 1029 (CA7 1980); *United States* v. *Tompkins*, 623 F. 2d 824, 828–829 (CA2 1980). This conflict among the Courts of Appeals has now gained the attention of, and been a source of confusion to, the state courts as well. See, *e. g.*, *State* v. *Christensen*, 40 Wash. App. 290, 292–297, 698 P. 2d 1069, 1071–1073 (1985) (discussing the varying applications of *Faretta*).

Because a conflict among the lower courts has emerged concerning the proper application and interpretation of our decision in *Faretta*, I would grant certiorari and address the question presented by this petition.

No. 87–615. DETSEL, AN INFANT, BY HER MOTHER AND NEXT FRIEND, DETSEL *v.* BOARD OF EDUCATION OF THE AUBURN ENLARGED CITY SCHOOL DISTRICT ET AL. C. A. 2d Cir. Motion of Advocacy Inc. et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 820 F. 2d 587.

No. 87–618. MEDICAL INC. *v.* REGENTS OF THE UNIVERSITY OF MINNESOTA. Ct. App. Minn. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 405 N. W. 2d 474.

No. 87–648. PENNSYLVANIA *v.* CEPHAS. Super. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis*

granted. Certiorari denied. Reported below: 361 Pa. Super. 160, 522 A. 2d 63.

No. 87–5628. WILLOUGHBY *v.* KENTUCKY. Sup. Ct. Ky.; and
No. 87–5692. OWENS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: No. 87–5628, 730 S. W. 2d 921; No. 87–5692, 293 S. C. 161, 359 S. E. 2d 275.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 86–6923. BROWN *v.* DODD, SHERIFF, *ante*, p. 874;
No. 87–75. COMMISSIONER OF INTERNAL REVENUE *v.* MCCOY, EXECUTOR OF THE ESTATE OF MCCOY, *ante*, p. 3;
No. 87–406. GRACEY *v.* UNITED STATES, *ante*, p. 914;
No. 87–5141. ESPENSHADE *v.* PENNSYLVANIA STATE UNIVERSITY ET AL., *ante*, p. 862; and
No. 87–5387. WALL *v.* PENNSYLVANIA, *ante*, p. 916. Petitions for rehearing denied.

No. 87–5426. SCHASTOK *v.* TIME INC., *ante*, p. 902. Motion for leave to file petition for rehearing denied.

DECEMBER 8, 1987

Miscellaneous Order. (For the Court's order amending Rule 35.3 of the Rules of this Court, see *post*, p. 1085.)

DECEMBER 14, 1987

Appeals Dismissed

No. 87–639. PERATI *v.* BUELL ET AL. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 87–5698. ECKERT *v.* UNITED STATES. Appeal from C. A. 8th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 87–658. ROSS ET UX. *v.* CITY OF ROLLING HILLS ESTATES ET AL. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of a properly presented federal question. Reported below: 192 Cal. App. 3d 370, 238 Cal. Rptr. 561.

Certiorari Granted—Vacated and Remanded

No. 87–583. UNITED PAPERWORKERS INTERNATIONAL UNION, AFL–CIO, LOCAL NO. 1069 *v.* S. D. WARREN CO., A DIVISION OF SCOTT PAPER CO. C. A. 1st Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Paperworkers* v. *Misco, Inc.*, *ante*, p. 29. Reported below: 815 F. 2d 178.

Miscellaneous Orders

No. 85–1765. BANKERS LIFE & CASUALTY CO. *v.* CRENSHAW. Sup. Ct. Miss. [Probable jurisdiction noted, 480 U. S. 915.] Conditional motion of appellee for leave to file a supplemental brief after argument granted. JUSTICE STEVENS took no part in the consideration or decision of this motion.

No. 86–1052. VOLKSWAGENWERK AKTIENGESELLSCHAFT *v.* SCHLUNK, ADMINISTRATOR OF THE ESTATES OF SCHLUNK ET AL. App. Ct. Ill., 1st Dist. [Certiorari granted, *ante*, p. 895.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 86–1406. PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS ET AL. *v.* ISLA PETROLEUM CORP. ET AL. Temp. Emerg. Ct. App. [Certiorari granted, *ante*, p. 814.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 86–1743. MONESSEN SOUTHWESTERN RAILWAY CO. *v.* MORGAN. Sup. Ct. Pa. [Probable jurisdiction noted, *ante*, p. 813.] Motion of Association of American Railroads for leave to file a brief as *amicus curiae* granted.

No. 87–65. UNITED STATES *v.* PROVIDENCE JOURNAL CO. ET AL. C. A. 1st Cir. [Certiorari granted, *ante*, p. 814.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 87–323. SOKOLOV *v.* UNITED STATES. C. A. 2d Cir. Motion of petitioner to defer consideration of the petition for writ of certiorari granted.

No. 87–329. THE FLORIDA STAR *v.* B. J. F. Appeal from Dist. Ct. App. Fla., 1st Dist. Because this appeal involves a question of law of the State of Florida which is determinative of this cause and for which there is no controlling precedent of the Supreme Court of Florida, this Court, pursuant to Article V, Section 3(b)(6) of the Florida Constitution, certifies to the Supreme Court of Florida and respectfully requests that court to answer, the following question: "Whether the Florida Supreme Court had jurisdiction, pursuant to Article V, Section 3(b)(3) of the Florida Constitution or otherwise, to hear appellant's appeal in this cause from the Florida First District Court of Appeal?" It is further ordered that the Clerk of this Court shall transmit to the Supreme Court of Florida certified copies of this order and the briefs filed in this Court in this matter. And it is further ordered that this Court shall retain jurisdiction of this matter and that the proceedings in this Court shall be held in abeyance until further order of this Court.

No. 87–636. KARAHALIOS *v.* NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1263. C. A. 9th Cir.; and

No. 87–652. ALBERTA GAS CHEMICALS LTD. ET AL. *v.* E. I. DU PONT DE NEMOURS & CO. ET AL. C. A. 3d Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 87–5565. CLARK *v.* JETER. Super. Ct. Pa. Motion of Women's Legal Defense Fund for leave to file a brief as *amicus curiae* granted.

Probable Jurisdiction Noted

No. 87–654. NEW ENERGY COMPANY OF INDIANA *v.* LIMBACH, TAX COMMISSIONER OF OHIO, ET AL. Appeal from Sup. Ct. Ohio. Probable jurisdiction noted. Reported below: 32 Ohio St. 3d 206, 513 N. E. 2d 258.

Certiorari Granted

No. 87–59. UNITED STATES POSTAL SERVICE *v.* NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL–CIO. C. A. D. C. Cir. Certiorari granted limited to Question 2 presented by the

petition. Reported below: 258 U. S. App. D. C. 260, 810 F. 2d 1239.

No. 87-499. CHRISTIANSON ET AL. *v.* COLT INDUSTRIES OPERATING CORP. C. A. Fed. Cir. Certiorari granted limited to Question 1 presented by the petition. In addition to this question, the parties are directed to brief and argue the following question: "Did the United States Court of Appeals for the Federal Circuit have jurisdiction of the appeal from the District Court judgment entered on July 19, 1985?" Reported below: 822 F. 2d 1544.

Certiorari Denied. (See also Nos. 87-639 and 87-5698, *supra.*)

No. 86-431. BEVLES CO., INC. *v.* TEAMSTERS LOCAL 986. C. A. 9th Cir. Certiorari denied. Reported below: 791 F. 2d 1391.

No. 86-1380. ARKANSAS PUBLIC SERVICE COMMISSION ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL.;

No. 86-1424. ARKANSAS POWER & LIGHT CO. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL.; and

No. 87-469. REYNOLDS METALS CO. ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: Nos. 86-1380 and 86-1424, 257 U. S. App. D. C. 244, 808 F. 2d 1525; No. 87-469, 257 U. S. App. D. C. 244, 808 F. 2d 1525, and 262 U. S. App. D. C. 42, 822 F. 2d 1104.

No. 86-7032. WASHINGTON *v.* DEPARTMENT OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 813 F. 2d 390.

No. 87-131. SIERRA CLUB *v.* SHELL OIL CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 817 F. 2d 1169.

No. 87-312. DUNCAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 189 Cal. App. 3d 1348, 234 Cal. Rptr. 877.

No. 87-425. LONGIOTTI ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 819 F. 2d 65.

No. 87-632. CALLAHAN ET VIR *v.* SOUTH CENTRAL BELL TELEPHONE CO. C. A. 5th Cir. Certiorari denied. Reported below: 826 F. 2d 10.

No. 87–641. SOBCZYK *v.* AETNA CASUALTY & SURETY CO. ET AL. Ct. App. Wis. Certiorari denied. Reported below: 140 Wis. 2d 862, 411 N. W. 2d 428.

No. 87–657. FOWLER *v.* BOARD OF EDUCATION OF LINCOLN COUNTY, KENTUCKY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 819 F. 2d 657.

No. 87–659. HAMMOND *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 821 F. 2d 473.

No. 87–663. GREENWALD *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 501 So. 2d 740.

No. 87–664. RAMMING *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 106 N. M. 42, 738 P. 2d 914.

No. 87–665. LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* YOUNG. C. A. 5th Cir. Certiorari denied. Reported below: 821 F. 2d 1133.

No. 87–666. WHEELER *v.* MAIN HURDMAN. C. A. 10th Cir. Certiorari denied. Reported below: 825 F. 2d 257.

No. 87–672. FOXGORD, INDIVIDUALLY AND AS TRUSTEE OF THE FOXGORD TRUST, ET UX. *v.* HISCHEMOELLER. C. A. 9th Cir. Certiorari denied. Reported below: 820 F. 2d 1030.

No. 87–673. ST. HILAIRE *v.* INTERNATIONAL PAPER REALTY CORP. (two cases). Sup. Jud. Ct. Me. Certiorari denied. Reported below: 528 A. 2d 446 (first case); 525 A. 2d 1035 (second case).

No. 87–674. MIHALEK CORP. ET AL. *v.* MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 814 F. 2d 290.

No. 87–678. STALLCOP *v.* KAISER PERMANENTE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 820 F. 2d 1044.

No. 87–684. GILL *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 497 So. 2d 856.

No. 87–685. CITY OF PAGEDALE, MISSOURI *v.* HARRIS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 821 F. 2d 499.

No. 87–691. GALARDI *v.* LERNER. C. A. 9th Cir. Certiorari denied.

No. 87–708. HOLIFIELD *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 511 So. 2d 275.

No. 87–757. IN RE STURMAN. C. A. 6th Cir. Certiorari denied.

No. 87–760. KONG ET UX. *v.* HAWAIIAN MARINE LINES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 823 F. 2d 1552.

No. 87–770. SUAREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 820 F. 2d 1158.

No. 87–774. AGUIAR, AKA WOODS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 825 F. 2d 39.

No. 87–808. FLETCHER ET AL. *v.* ESTATE OF CHRIST. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 508 So. 2d 1239.

No. 87–5230. NELSON *v.* UNITED STATES;
No. 87–5621. KILLIP *v.* UNITED STATES; and
No. 87–5635. KROUT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 819 F. 2d 1542.

No. 87–5233. JACKSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 87–5369. TINSLEY *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

No. 87–5388. PENNON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 816 F. 2d 527.

No. 87–5431. WICKER *v.* SOUTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 818 F. 2d 862.

No. 87–5524. ORELLANA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 809 F. 2d 1072.

No. 87–5534. HARPER *v.* ALABAMA STATE DEPARTMENT OF HUMAN RESOURCES ET AL. C. A. 11th Cir. Certiorari denied.

No. 87–5537. GROSSHANS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 821 F. 2d 1247.

No. 87–5680. WINFIELD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 87–5691. WARE *v.* KERBY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 87–5700. BAILEY *v.* PRINCE GEORGE'S COUNTY, MARYLAND, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 34.

No. 87–5701. BAILEY *v.* STATE'S ATTORNEY FOR PRINCE GEORGE'S COUNTY. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 1119.

No. 87–5702. WASHINGTON *v.* MAKOWSKI. C. A. 10th Cir. Certiorari denied.

No. 87–5706. MONDRAGON *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied.

No. 87–5707. ROGERS *v.* KOEHLER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 821 F. 2d 649.

No. 87–5708. BENOIT *v.* CITY POLICE DEPARTMENT OF CROWLEY, LOUISIANA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 826 F. 2d 10.

No. 87–5709. JONES *v.* CITY OF ST. LOUIS ET AL. C. A. 8th Cir. Certiorari denied.

No. 87–5714. TOTH *v.* AMERICAN GREETINGS CORP. C. A. 6th Cir. Certiorari denied. Reported below: 811 F. 2d 608.

No. 87–5719. PAYNE *v.* LEFEVRE, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 825 F. 2d 702.

No. 87–5725. HIGGINS *v.* WYOMING WORKERS' COMPENSATION DIVISION ET AL. Sup. Ct. Wyo. Certiorari denied. Reported below: 739 P. 2d 129.

No. 87–5728. LEPISCOPO *v.* WIHL. C. A. 10th Cir. Certiorari denied.

No. 87–5730. DAVIS *v.* JABE. C. A. 6th Cir. Certiorari denied. Reported below: 824 F. 2d 483.

No. 87–5733. NOLL *v.* BLEVINS, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 831 F. 2d 300.

No. 87–5738. WOOLUM *v.* PARKE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 820 F. 2d 1226.

No. 87–5747. TELEPO *v.* NEW JERSEY ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 87–5758. BILLET *v.* AMERICAN FAMILY PUBLISHERS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 822 F. 2d 61.

No. 87–5800. BERTON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 87–5802. HESTER *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 734 S. W. 2d 457.

No. 87–5812. ROAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 811 F. 2d 610.

No. 87–5822. LATORRE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 825 F. 2d 572.

No. 87–5832. PAGE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 828 F. 2d 1476.

No. 87–5845. FINOCCHIARO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 823 F. 2d 542.

No. 87–5870. SIMMONS *v.* TUDOR ENGINEERING CO. C. A. 9th Cir. Certiorari denied. Reported below: 829 F. 2d 41.

No. 87–246. L. E. MYERS CO., HIGH VOLTAGE DIVISION, ET AL. *v.* SECRETARY OF LABOR. C. A. 6th Cir. Certiorari denied. Reported below: 818 F. 2d 1270.

JUSTICE WHITE, with whom JUSTICE O'CONNOR joins, dissenting.

The issue in this case is upon which party in an Occupational Safety and Health Administration (OSHA) enforcement action does the burden of proving that a workplace accident was the result of unforeseeable employee misconduct fall. The Court of Appeals for the Sixth Circuit held that the issue of unforeseeable employee misconduct is an affirmative defense: once the Government establishes a prima facie case of an employer's failure to im-

plement an effective safety program, then the employer has the burden of proving that the violation was caused by unforeseeable employee misconduct rather than inadequacies in the enforcement of its safety program. *Brock* v. *L. E. Myers Co., High Voltage Div.*, 818 F. 2d 1270 (1987). In so holding, the court agreed with the position of the Eighth Circuit, *Danco Construction Co.* v. *OSHRC*, 586 F. 2d 1243 (1978), but reinforced the already confusing patchwork of conflicting approaches to this issue. In contrast to this position, some Circuits have held that the employer bears the burden of proving that it has implemented workplace safety rules that are effectively enforced, without imposing an initial evidentiary burden on the Government with respect to this defense. *H. B. Zachry Co.* v. *OSHRC*, 638 F. 2d 812 (CA5 1981); *General Dynamics Corp., Quincy Shipbuilding Div.* v. *OSHRC*, 599 F. 2d 453 (CA1 1979). Other Courts of Appeals place upon the Government the burden of proving that the accident was not the result of unforeseeable employee misconduct. *Pennsylvania Power & Light Co.* v. *OSHRC*, 737 F. 2d 350 (CA3 1984); *Capital Electric Line Builders of Kansas, Inc.* v. *Marshall*, 678 F. 2d 128 (CA10 1982); *Ocean Electric Corp.* v. *Secretary of Labor*, 594 F. 2d 396 (CA4 1979); *Brennan* v. *OSHRC*, 511 F. 2d 1139 (CA9 1975). This conflict among the Circuits shows no signs of abating and the issue is central to OSHA's enforcement efforts; accordingly, I would grant certiorari.

No. 87–607. WEBB, SECRETARY OF THE NAVY *v.* MALDONADO. C. A. 9th Cir. Certiorari denied. Reported below: 811 F. 2d 1341.

JUSTICE WHITE, dissenting.

In *Blum* v. *Stenson*, 465 U. S. 886 (1984), the Court defined what constitutes a "reasonable attorney's fee" under 42 U. S. C. § 1988 for salaried attorneys employed by legal aid organizations. We held that the fee awards of such attorneys must be calculated on the basis of the prevailing community rate for similar services by attorneys of comparable skill, experience, and reputation. *Id.*, at 895–896, and n. 11. We did not decide whether the fee awards of private attorneys with an established billing rate must be calculated in the same manner.

Here, the Court of Appeals for the Ninth Circuit upheld an attorney's fee award under 42 U. S. C. § 2000e–5(k) based on an hourly rate that was consistent with the prevailing market rate

but that substantially exceeded counsel's own customary billing rate. *Maldonado* v. *Lehman*, 811 F. 2d 1341 (1987). The court expressly rejected the approach adopted by the Court of Appeals for the District of Columbia Circuit in *Laffey* v. *Northwest Airlines, Inc.*, 241 U. S. App. D. C. 11, 746 F. 2d 4 (1984), cert. denied, 472 U. S. 1021 (1985), which held that an attorney's customary billing rate must be used in calculating a fee award so long as that rate is not unusually high or low.

It is true that the District of Columbia Circuit recently granted rehearing en banc in *Save Our Cumberland Mountains, Inc.* v. *Hodel*, 263 U. S. App. D. C. 409, 826 F. 2d 43 (1987), for the purpose of deciding whether *Laffey* ought to be reconsidered. The *Cumberland Mountains* case has been held in abeyance, however, pending the resolution of the petition for certiorari in this case. Hence, the conflict persists between the Ninth Circuit's decision in this case and the District of Columbia Circuit's decision in *Laffey*. It cannot be said with any certainty that the latter court will decide to overrule *Laffey* in whole or in part.

In addition, there is some tension between the Ninth Circuit's definition of a "reasonable" fee and other courts' definition of the term as "a fee large enough to induce competent counsel to handle the plaintiff's case, but no larger." *Lenard* v. *Argento*, 808 F. 2d 1242, 1247 (CA7 1987). See also *Coulter* v. *Tennessee*, 805 F. 2d 146, 148–149 (CA6 1986) ("Congress did not intend that lawyers . . . receive excess compensation or incentives beyond the amount necessary to cause competent legal work to be performed"), cert. denied, 482 U. S. 914 (1987). It is at least arguable that an attorney will have sufficient incentive to accept a case so long as he receives the same fee from suing the government as he would receive from suing a private party.

Finally, the question of what constitutes a "reasonable" fee for an attorney with an established billing rate is likely to arise in other circuits. The Court has previously observed that more than 100 federal statutes provide for an award of attorney's fees to the prevailing party, and that "the benchmark for the awards under nearly all of these statutes is that the attorney's fee must be 'reasonable.'" *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U. S. 546, 562 (1986). Hence, since fee awards under all statutes that provide for "reasonable" attorney's fees are calculated in a similar manner, the petition raises an issue of considerable practical importance.

Because a conflict has arisen between two Courts of Appeals concerning the calculation of a "reasonable" fee for attorneys with established billing rates, I would grant certiorari and address the question presented by this petition.

No. 87–697. ROTHENBERG *v.* AMALGAMATED SUGAR CO. ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 825 F. 2d 634.

No. 87–791. ELORTEGUI ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 827 F. 2d 774.

Rehearing Denied

No. 86–7015. PERRY *v.* LOUISIANA, *ante*, p. 872;

No. 87–405. IN RE YEE, *ante*, p. 923;

No. 87–5441. LUTTRELL ET AL. *v.* MARTINEZ, GOVERNOR OF FLORIDA, ET AL., *ante*, p. 930;

No. 87–5506. HORTON *v.* TRAMMELL ET AL., *ante*, p. 946; and

No. 87–5619. BUSSEY *v.* LEVY, FERGUSON & GRADY ET AL., *ante*, p. 933. Petitions for rehearing denied.

JANUARY 7, 1988

Miscellaneous Order

No. A–527. STREETMAN *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant the application for a stay and vacate the death sentence in this case. Even if I did not hold this view, for the reasons stated below I still would be compelled to vote to overturn this sentence.

I

Streetman was convicted in Texas of murder and sentenced by a jury to die. Pursuant to Texas law, Tex. Code Crim. Proc. Ann.,

Art. 37.071(b) (Vernon 1981 and Supp. 1988), the jury was told that if they answered "yes" to two special questions, Streetman would automatically be sentenced to death.

The first question asked "whether the evidence established beyond a reasonable doubt that the murder of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result." As JUSTICE BLACKMUN has observed, an affirmative answer to this question is generally a foregone conclusion because intent is usually an element of the underlying crime of capital murder. *Barefoot* v. *Estelle*, 463 U. S. 880, 916–917, and n. 1 (1983) (dissenting opinion). Thus, Streetman's life hinged on the second question: "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."

The jury returned with their answers: "Yes" to both questions. The sentence was accordingly fixed at death, and the Texas Court of Criminal Appeals affirmed the judgment. 698 S. W. 2d 132 (1985). Streetman's first state and federal habeas corpus petitions (raising issues unrelated to the issue discussed below) were denied. 634 F. Supp. 290 (ED Tex. 1986); 812 F. 2d 950 (CA5 1987); 818 F. 2d 865 (CA5 1987). He then filed a second state habeas corpus petition in the state court calling into question, *inter alia*, the constitutionality of the Texas death penalty scheme's treatment of mitigating evidence. The petition was denied in state court, and the subsequent second federal habeas corpus petition was denied by the District Court and the Court of Appeals. 674 F. Supp. 229; 835 F. 2d 1519; 835 F. 2d 1521 (1988). This application for a stay followed.

II

In 1976, this Court approved generally the Texas death penalty scheme. *Jurek* v. *Texas*, 428 U. S. 262 (1976). In the course of its analysis, the Court considered the treatment of mitigating evidence during the sentencing phase. The joint opinion announcing the judgment found that the Texas courts had construed the second special question "so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show." *Id.*, at 272 (opinion of Stewart, Powell, and STEVENS, JJ.).

In *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978), the plurality held that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Ibid.* (opinion of Burger, C. J.). The Court has applied and explained *Lockett* in the nine years since it was announced. In *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), the Court applied *Lockett* to strike a state statute that precluded the sentencer from considering certain relevant mitigating *evidence*, in support of mitigating factors. Later, in *Skipper* v. *South Carolina*, 476 U. S. 1 (1986), the Court expressly stated that the sentencer must be given *all* mitigating evidence, defined as any evidence that "might serve 'as a basis for a sentence less than death.'" *Id.*, at 5 (quoting *Lockett*, *supra*, at 604).

This line of cases culminated last term in *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987). That unanimous opinion began "[w]e have held that in capital cases, '"the sentencer"' may not refuse to consider or '"be precluded from considering"' any relevant mitigating evidence." *Id.*, at 394 (quoting *Skipper*, *supra*, at 4, in turn quoting *Eddings*, *supra*, at 110). In considering the validity of a Florida death sentence, the Court concluded that "it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of *Skipper* . . . , *Eddings* . . . , and *Lockett* . . . ." 481 U. S., at 399.

From these cases it is clear that *all* relevant mitigating evidence must be available for consideration by the sentencer. The reasons underlying this firmly established rule lie in the unique nature of the death penalty. "[D]eath is a 'punishment different from all other sanctions,' . . . and . . . therefore the considerations that inform the sentencing decision may be different from those that might be relevant to other liability or punishment determinations." *Booth* v. *Maryland*, 482 U. S. 496, 509, n. 12 (1987) (quoting *Woodson* v. *North Carolina*, 428 U. S. 280, 303–304, 305 (1976) (plurality opinion of Stewart, Powell, and STEVENS, JJ.)). To this end, mitigating evidence that might be excludable in noncapital-sentencing procedures may be crucial in a capital case.

In *Sumner* v. *Shuman*, 483 U. S. 66 (1987), this Court held categorically that mandatory death sentences are unconstitutional, a determination foreshadowed by *Woodson*, *supra*. These cases recognize that a sentencer cannot make a judgment based on the facts of the particular case without all relevant mitigating evidence, *Sumner*, *supra*, at 75–76, and n. 5. Although disallowing such evidence would produce uniformity of sentences, the Court has "recognize[d] that a consistency produced by ignoring individual differences is a false consistency." *Eddings*, *supra*, at 112. This "false consistency" is a natural consequence of the unadorned jury instructions given under Texas law.

In the instant case, the record discloses that Streetman has had a history of mental illness, stemming from an injury incurred while he was in the fifth grade, a circumstance that in every other jurisdiction would be considered mitigating. Yet the jury that sentenced him to die could draw but one inference from this evidence: Streetman posed a substantial threat of future dangerousness. Streetman complains that in Texas, evidence that could evoke feelings of sympathy or convince a jury that the defendant is not culpable enough to deserve death is perversely transformed into a factor militating solely in favor of death, in violation of *Lockett*, *supra*, and its progeny. Indeed, without an instruction informing the jury that the second special question is far broader than its words imply, he was faced with a true dilemma: introduce the evidence and run the risk that the jury will use it to answer affirmatively the second special question, or exclude the evidence entirely. We have already granted certiorari to consider this very question: "whether the jury must be instructed on the effect of mitigating evidence under the Texas capital punishment scheme." *Franklin* v. *Lynaugh*, *ante*, p. 891. Nonetheless, the Court today refuses to stay Streetman's execution.

III

Streetman, in his application for stay raises precisely the question we agreed to consider in *Franklin*. Despite the fact that there were sufficient votes on this Court to hold Streetman's case for *Franklin*, there were not enough votes to grant Streetman's application for a stay. Had Streetman been convicted of bank robbery, this would be of no moment. The Court would simply hold Streetman's case until *Franklin* was decided, and then take appropriate action. But death is different. Due to the unique

nature of the penalty, the relief that we could give any other type of habeas corpus petitioner is unavailable to Streetman. His case will be moot long before we can resolve *Franklin*—he will be dead. Therefore, we are presented with the same ironic situation as occurred in *Watson* v. *Butler*, 483 U. S. 1037 (1987), in which the normal and time-tested procedures of this Court are overcome by the different nature of the death penalty. Death is certainly different, but I had never believed it to be different in this way.

IV

The courts below have held that Streetman's habeas corpus petition does not actually raise the question presented in *Franklin* because he failed to preserve the issue at his trial, I suppose by failing to request a particular jury instruction. However, it is clear that under Texas law the trial court was discouraged from giving a mitigating evidence instruction. *Stewart* v. *State*, 686 S. W. 2d 118 (Tex. Crim. App. 1984). In fact, the court in *Stewart*, over a vigorous dissent, specifically held that "no jury charge regarding evidence of any mitigating circumstances [is] necessary since the questions prescribed under Article 37.071 clearly allow the jury to grasp the logical relevance of mitigating evidence." *Id.*, at 121 (citing *Quinones* v. *State*, 592 S. W. 2d 933, 947 (Tex. Crim. App. 1980)). That holding has been reiterated in numerous cases. *Clark* v. *State*, 717 S. W. 2d 910 (Tex. Crim. App. 1986); *Fierro* v. *State*, 706 S. W. 2d 310 (Tex. Crim. App. 1986); *Johnson* v. *State*, 691 S. W. 2d 619 (Tex. Crim. App. 1985); *Lackey* v. *State*, 638 S. W. 2d 439 (Tex. Crim. App. 1982); *Adams* v. *State*, 577 S. W. 2d 717 (Tex. Crim. App. 1979). Additionally, Texas has adopted pattern jury instructions. The instructions for death cases say nothing regarding how the jury is to consider mitigating evidence that actually supports a finding of future dangerousness. P. McClung, Jury Charges for Texas Criminal Practice 75–78 (rev. ed. 1981). If, as a matter of course and relying on *Stewart* and *Quinones* as well as the pattern jury instructions, Texas trial judges refuse to give such instructions when asked, Streetman surely was under no duty to make the futile request. Of course, whether or not this is the case in Texas is a question of fact. A habeas court has a duty to determine whether a hearing is necessary to resolve this question. See Habeas Corpus Rule 8. I believe that Streetman is entitled to an opportunity to make the required showing before he is executed.

Nor do I believe that Streetman could reasonably be held barred under an abuse-of-the-writ theory, as the District Court apparently found. The *Franklin* claim was not foreseeable prior to this Court's issuance of the stay order. In light of this Court's decision in *Jurek*, *supra*, upholding the Texas scheme, and the citation to *Jurek* in *Lockett*, *supra*, coupled with the Fifth Circuit's explicit rejection of the claim, it was not abusive for Streetman to fail to raise the issue in his first federal petition.

Finally, as to the failure to raise the question on direct appeal, there is certainly no bar. Precedent in the Fifth Circuit and statements from this Court provided cause for the failure. See *Reed* v. *Ross*, 468 U. S. 1, 12–16 (1984).

For these reasons, I cannot conclude that Streetman's *Franklin* claim was procedurally barred. Consequently, I must dissent from the refusal of this Court to stay Streetman's death until we definitively resolve the questions his petition presents.

V

Streetman also raises a broader challenge to the Texas death penalty scheme. He alleges that given the nature of the special death penalty questions, no instruction, however phrased, could adequately inform the jury of its constitutional duty to consider properly all mitigating evidence. As a panel of the Court of Appeals for the Fifth Circuit has cogently demonstrated, it is time for this Court to reconsider the Texas system in light of the intervening precedent. *Penry* v. *Lynaugh*, 832 F. 2d 915 (1987). The persuasive opinions of Judges Reavley and Garwood conclusively demonstrate to me that certiorari should be granted to consider such a challenge. Consequently, I dissent from the Court's refusal to consider this broader claim. It may be true, as some have argued, that if the Texas death penalty statute is unconstitutional, the fault lies with this Court rather than with the State. But even if that is so, it is the height of unfairness to make Streetman pay for our mistake.

I dissent.

JANUARY 11, 1988

Affirmed on Appeal

No. 87–343. MONTANA ET AL. *v.* CROW TRIBE OF INDIANS ET AL. Affirmed on appeal from C. A. 9th Cir. THE CHIEF JUS-

TICE would note probable jurisdiction and set case for oral argument. Reported below: 819 F. 2d 895.

Appeals Dismissed

No. 87–719. MARTIN *v.* GEORGIA DEPARTMENT OF PUBLIC SAFETY ET AL. Appeal from Sup. Ct. Ga. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE BRENNAN would postpone further consideration of the question of jurisdiction to a hearing of the case on the merits. Reported below: 257 Ga. 300, 357 S. E. 2d 569.

No. 87–720. HAGEN, EXECUTRIX OF THE ESTATE OF HAGEN *v.* SOUTH DAKOTA ET AL. Appeal from Sup. Ct. S. D. dismissed for want of jurisdiction. Reported below: 403 N. W. 2d 33.

No. 87–756. CHAPMAN *v.* FLORIDA. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 511 So. 2d 297.

No. 87–779. DOBARD *v.* CITY OF OAKLAND ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 812 F. 2d 1411.

No. 87–5625. AUGUST *v.* COUNTY OF LOS ANGELES. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 87–5731. DENARDO *v.* WILLIAMS ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 87–5837. BOYD *v.* UNITED STATES. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 815 F. 2d 83.

No. 87–5872. SPYCHALA *v.* MORRIS, WARDEN. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the

papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 817 F. 2d 106.

No. 87-960. LOSS *v.* SUPREME COURT OF ILLINOIS ET AL. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Reported below: 119 Ill. 2d 186, 518 N. E. 2d 981.

No. 87-5504. SARLUND *v.* WISCONSIN. Appeal from Sup. Ct. Wis. dismissed for want of substantial federal question. Reported below: 139 Wis. 2d 386, 407 N. W. 2d 544.

No. 87-5903. MOYA-GOMEZ *v.* WISCONSIN. Appeal from Ct. App. Wis. dismissed for want of properly presented federal question.

Certiorari Granted—Vacated and Remanded.

No. 87-653. GOVERNMENT OF THE VIRGIN ISLANDS *v.* JDS REALTY CORP. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals to consider the question of mootness. Reported below: 824 F. 2d 256.

Miscellaneous Orders

No. — — —. COOPER *v.* RUBIN;
No. — — —. MARENO *v.* UNITED STATES; and
No. — — —. AMERICAN PETROFINA COMPANY OF TEXAS *v.* OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION, LOCAL NO. 4-23, ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. A-438. PEREZ ET AL. *v.* UNITED STATES. C. A. 11th Cir. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A-491. GEORGETOWN UNIVERSITY ET AL. *v.* GAY RIGHTS COALITION OF GEORGETOWN UNIVERSITY LAW CENTER ET AL. C. A. D. C. Cir. Application for stay, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. The orders entered December 24, 1987, and December 31, 1987, in this case are vacated. JUSTICE SCALIA took no part in the consideration or decision of this application.

No. D-666. IN RE DISBARMENT OF KEEHAN. It is ordered that M. Patrick Keehan, of Towson, Md., be suspended from the practice of law in this Court and that a rule issue, returnable

within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 86–958. NORWEST BANK WORTHINGTON ET AL. *v.* AHLERS ET UX. C. A. 8th Cir. [Certiorari granted, 483 U. S. 1004.] Motion of petitioners for leave to file a reply brief out of time denied.

No. 86–1052. VOLKSWAGENWERK AKTIENGESELLSCHAFT *v.* SCHLUNK, ADMINISTRATOR OF THE ESTATES OF SCHLUNK ET AL. App. Ct. Ill., 1st Dist. [Certiorari granted, *ante*, p. 895.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 86–1970. MISSISSIPPI POWER & LIGHT CO. *v.* MISSISSIPPI EX REL. PITTMAN, ATTORNEY GENERAL OF MISSISSIPPI, ET AL. Sup. Ct. Miss. [Probable jurisdiction postponed, *ante*, p. 813.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 86–6124. BENNETT *v.* ARKANSAS. Sup. Ct. Ark. [Certiorari granted, *ante*, p. 895.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 86–1145. PATRICK *v.* BURGET ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 814.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

No. 86–1430. PERALTA *v.* HEIGHTS MEDICAL CENTER, INC., DBA HEIGHTS HOSPITAL, ET AL. Ct. App. Tex., 1st Dist. [Probable jurisdiction noted, 481 U. S. 1067.] Motion of appellee for leave to file a supplemental brief after argument denied.

No. 86–1685. FLORIDA ET AL. *v.* LONG ET AL. C. A. 11th Cir. [Certiorari granted, *ante*, p. 814.] Motion of Equal Employment Advisory Council et al. for leave to file a brief as *amici curiae* granted.

No. 86–7113. KADRMAS ET AL. *v.* DICKINSON PUBLIC SCHOOLS ET AL. Sup. Ct. N. D. [Probable jurisdiction noted, *ante*, p. 813.] Motion of North Dakota for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of appellees to dismiss appeal denied.

No. 87–16. SHAPERO *v.* KENTUCKY BAR ASSN. Sup. Ct. Ky. [Certiorari granted, *ante*, p. 814.] Motions of The Academy of Florida Trial Lawyers and the Florida Bar for leave to file briefs as *amici curiae* granted.

No. 87–65. UNITED STATES *v.* PROVIDENCE JOURNAL CO. ET AL. C. A. 1st Cir. [Certiorari granted, *ante*, p. 814.] Motion of the Solicitor General for leave to file a brief as *amicus curiae* granted. Further consideration of motion of respondent to dismiss the writ of certiorari deferred to hearing of case on the merits. This case will be heard on oral argument January 20, 1988, in place of No. 86–1387, *Mackey et al.* v. *Lanier Collection Agency & Service, Inc.* [certiorari granted, 483 U. S. 1004].

No. 87–82. FEDERAL DEPOSIT INSURANCE CORPORATION *v.* MALLEN ET AL. D. C. N. D. Iowa. [Probable jurisdiction noted, *ante*, p. 911.] Motion of appellee James E. Mallen for leave to proceed further herein *in forma pauperis* granted.

No. 87–363. FEDERAL ENERGY REGULATORY COMMISSION *v.* MARTIN EXPLORATION MANAGEMENT CO. ET AL.; and

No. 87–364. PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK ET AL. *v.* MARTIN EXPLORATION MANAGEMENT CO. ET AL. C. A. 10th Cir. [Certiorari granted, *ante*, p. 962.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 87–517. COE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Motion of petitioners for leave to file lower court orders under seal granted.

No. 87–600. VARIABLE ANNUITY LIFE INSURANCE CO. ET AL. *v.* OTTO. C. A. 7th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 87–5096. WEST *v.* ATKINS. C. A. 4th Cir. [Certiorari granted, *ante*, p. 912.] Motion of American Public Health Association for leave to file a brief as *amicus curiae* granted.

No. 87–5461. HENSON *v.* EAST LINCOLN TOWNSHIP ET AL. C. A. 7th Cir. [Certiorari granted, *ante*, p. 923.] Motion of the parties to defer further proceedings granted for 60 days.

No. 87–5794. IN RE REARDON. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until

February 1, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit a petition for writ of mandamus and/or prohibition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of mandamus and/or prohibition without reaching the merits of the motion to proceed *in forma pauperis*.

No. 87–5840. MCNAMARA *v.* COUNTY OF SAN DIEGO DEPARTMENT OF SOCIAL SERVICES. Appeal from Ct. App. Cal., 4th App. Dist. Motion of appellant for leave to proceed *in forma pauperis* denied. Appellant is allowed until February 1, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit a statement as to jurisdiction in compliance with Rule 33 of the Rules of this Court.

No. 87–700. IN RE GOODMAN. C. A. 11th Cir.; and

No. 87–5809. IN RE SIMS. C. A. 5th Cir. Petitions for writs of common-law certiorari denied.

No. 87–5943. IN RE ROBY; and

No. 87–5992. IN RE OLIVER. Petitions for writs of habeas corpus denied.

No. 87–5793. IN RE MONTGOMERY; and

No. 87–5811. IN RE TETER. Petitions for writs of mandamus denied.

No. 87–5993. IN RE MURRY. Petition for writ of prohibition denied.

Probable Jurisdiction Noted or Postponed

No. 87–775. UNITED FAMILIES OF AMERICA *v.* KENDRICK ET AL. Appeal from D. C. D. C. Probable jurisdiction noted, case consolidated with No. 87–253, *Bowen, Secretary of Health and Human Services* v. *Kendrick et al.* [probable jurisdiction noted, *ante*, p. 942], No. 87–431, *Bowen, Secretary of Health and Human Services* v. *Kendrick et al.* [probable jurisdiction noted, *ante*, p. 942], and No. 87–462, *Kendrick et al.* v. *Bowen, Secretary of Health and Human Services, et al.* [probable jurisdiction noted,

ante, p. 942], and a total of one hour allotted for oral argument in these cases. Reported below: 657 F. Supp. 1547.

No. 87–168. FRISBY ET AL. *v.* SCHULTZ ET AL. Appeal from C. A. 7th Cir. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 822 F. 2d 642.

Certiorari Granted

No. 87–498. BERKOVITZ ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. Reported below: 822 F. 2d 1322.

No. 87–645. HUFFMAN ET AL. *v.* WESTERN NUCLEAR, INC., ET AL. C. A. 10th Cir. Certiorari granted. Reported below: 825 F. 2d 1430.

No. 87–712. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* MASSACHUSETTS; and

No. 87–929. MASSACHUSETTS *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 1st Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 816 F. 2d 796.

No. 87–519. MAYNARD, WARDEN, ET AL. *v.* CARTWRIGHT. C. A. 10th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 822 F. 2d 1477.

No. 87–578. BANK OF NOVA SCOTIA *v.* UNITED STATES; and

No. 87–602. KILPATRICK ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari granted limited to Question 1 presented by each petition, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 821 F. 2d 1456.

No. 87–5565. CLARK *v.* JETER. Super. Ct. Pa. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 358 Pa. Super. 550, 518 A. 2d 276.

No. 87–5468. JOHNSON *v.* MISSISSIPPI. Sup. Ct. Miss. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions 1 and 2 presented by the petition. Reported below: 511 So. 2d 1333.

Certiorari Denied. (See also Nos. 87–719, 87–756, 87–779, 87–5625, 87–5731, 87–5837, 87–5872, 87–700, and 87–5809, *supra*.)

No. 86–6296. LAMBERT *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF

LABOR. C. A. 6th Cir. Certiorari denied. Reported below: 810 F. 2d 201.

No. 87–257. MARTINEZ *v.* LIZARRIBAR. Super. Ct. P. R. Certiorari denied.

No. 87–289. DUPAGE BANK & TRUST CO. *v.* PROPERTY TAX APPEAL BOARD OF THE ILLINOIS DEPARTMENT OF REVENUE ET AL. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 151 Ill. App. 3d 624, 502 N. E. 2d 1250.

No. 87–313. PAUL *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 84 N. C. App. 491, 353 S. E. 2d 254.

No. 87–316. ALLEN ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 816 F. 2d 1417.

No. 87–324. SAIPAIA *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 24 M. J. 172.

No. 87–347. ADAMS ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 818 F. 2d 201.

No. 87–391. CHASER SHIPPING CORP. ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 819 F. 2d 1129.

No. 87–394. CATANESE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 817 F. 2d 753.

No. 87–397. INDEPENDENT COMMUNITY BANKERS ASSOCIATION OF SOUTH DAKOTA, INC. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 261 U. S. App. D. C. 20, 820 F. 2d 428.

No. 87–437. PINKNEY ET AL. *v.* DOW CHEMICAL CO. ET AL.; and

No. 87–438. FRATICELLI ET AL. *v.* DOW CHEMICAL CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: No. 87–437, 818 F. 2d 145; No. 87–438, 818 F. 2d 210.

No. 87–460. BOSCIO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 87–513. MANVILLE FOREST PRODUCTS CORP. *v.* EVANS ET AL. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 505 So. 2d 924.

No. 87–525. BARNES ET AL. *v.* HODEL, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 819 F. 2d 250.

No. 87–527. CENTENO ET AL. *v.* SHULTZ, SECRETARY OF STATE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 817 F. 2d 1212.

No. 87–543. TRANSWESTERN PIPELINE CO. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 820 F. 2d 733.

No. 87–549. CITY OF EVANSTON ET AL. *v.* REGIONAL TRANSPORTATION AUTHORITY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 825 F. 2d 1121.

No. 87–553. MCCRIGHT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 821 F. 2d 226.

No. 87–562. SECURITIES INDUSTRY ASSN. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 261 U. S. App. D. C. 322, 821 F. 2d 810.

No. 87–589. FAGAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 821 F. 2d 1002.

No. 87–590. SIFLINGER *v.* MCLAUGHLIN, SECRETARY OF LABOR. C. A. 11th Cir. Certiorari denied. Reported below: 819 F. 2d 1148.

No. 87–592. CONNICK, DISTRICT ATTORNEY FOR THE PARISH OF ORLEANS *v.* MAIRENA. C. A. 5th Cir. Certiorari denied. Reported below: 816 F. 2d 1061.

No. 87–599. MASTERS, MATES & PILOTS PENSION PLAN *v.* DEAK ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 821 F. 2d 572.

No. 87–601. BRACKEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 87–616. BECK ET AL. *v.* MANUFACTURERS HANOVER TRUST CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 820 F. 2d 46.

No. 87–619. GARCIA *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 25 M. J. 159.

No. 87–621. CALIFORNIA ARCHITECTURAL BUILDING PRODUCTS, INC., ET AL. *v.* FRANCISCAN CERAMICS, INC., ET AL.; and No. 87–721. FRANCISCAN CERAMICS, INC., ET AL. *v.* CALIFORNIA ARCHITECTURAL BUILDING PRODUCTS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 818 F. 2d 1466.

No. 87–646. BLONDIN ET AL. *v.* WINNER, JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO. C. A. 10th Cir. Certiorari denied. Reported below: 822 F. 2d 969.

No. 87–662. COOPER *v.* WILLIAMSON COUNTY BOARD OF EDUCATION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 820 F. 2d 180.

No. 87–677. CASAZZA ET AL. *v.* HOLBROOK. Sup. Ct. Conn. Certiorari denied. Reported below: 204 Conn. 336, 528 A. 2d 774.

No. 87–681. RAWSON *v.* SEARS, ROEBUCK & CO. C. A. 10th Cir. Certiorari denied. Reported below: 822 F. 2d 908.

No. 87–686. SCHLENGER *v.* SCHLENGER, AKA PETRICEK, INDIVIDUALLY AND AS TRUSTEE OF THE UNITED WOOL PIECE DYEING & FINISHING COMPANY PENSION TRUST, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 822 F. 2d 54.

No. 87–689. UNITED TRANSPORTATION UNION *v.* NORFOLK & WESTERN RAILWAY CO. ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 262 U. S. App. D. C. 52, 822 F. 2d 1114.

No. 87–694. POITIER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 818 F. 2d 679.

No. 87–696. SOCIETY ORDO TEMPLI ORIENTIS IN AMERICA ET AL. *v.* MCMURTRY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 819 F. 2d 1146.

No. 87–701. BRADY *v.* PETTIT, MAYOR, LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, ET AL. Ct. App. Ky. Certiorari denied.

No. 87–704. MASSACHUSETTS MUTUAL LIFE INSURANCE CO. *v.* LITMAN. C. A. 11th Cir. Certiorari denied. Reported below: 825 F. 2d 1506.

No. 87–705. UNION PACIFIC RAILROAD CO. ET AL. *v.* ENERGY TRANSPORTATION SYSTEMS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 822 F. 2d 518.

No. 87–707. JOHNSON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 492 So. 2d 673.

No. 87–709. TRUDEAU ET AL. *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 139 Wis. 2d 91, 408 N. W. 2d 337.

No. 87–713. ANDRIJEVIC, AKA ANDRIE *v.* KELLERAN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 825 F. 2d 692.

No. 87–715. TUFFORD, DBA B & L PAWNSHOP *v.* DURGAN. Super. Ct. Alaska, 4th Jud. Dist. Certiorari denied.

No. 87–722. DODD, ADMINISTRATRIX OF THE ESTATE OF DODD *v.* CITY OF NORWICH ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 827 F. 2d 1.

No. 87–724. RIDDLE *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 86 N. C. App. 112, 356 S. E. 2d 835.

No. 87–726. DELAWARE COUNTY PRISON BOARD OF INSPECTORS *v.* HYNSON, A MINOR, BY AND THROUGH HER GRANDPARENT AND GUARDIAN, HYNSON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 827 F. 2d 932.

No. 87–729. BARIENT, INC., ET AL. *v.* LEWMAR MARINE, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 827 F. 2d 744.

No. 87–732. WHEELER ET AL. *v.* COMMISSIONER OF HIGHWAYS OF KENTUCKY. C. A. 6th Cir. Certiorari denied. Reported below: 822 F. 2d 586.

No. 87–733. ARENBURG *v.* FARMHOLME, INC., ET AL. App. Ct. Conn. Certiorari denied. Reported below: 11 Conn. App. 810, 526 A. 2d 1352.

No. 87–738. GUARINO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 131 App. Div. 2d 981, 516 N. Y. S. 2d 567.

No. 87–739. BOAT NIAGARA FALLS, INC. *v.* JOIA ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 817 F. 2d 908.

No. 87–740. BANOS *v.* IOWA. Sup. Ct. Iowa. Certiorari denied.

No. 87–743. CAMINITI ET AL. *v.* BOYLE, COMMISSIONER OF PUBLIC LANDS, ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 107 Wash. 2d 662, 732 P. 2d 989.

No. 87–744. ARMCO INC. *v.* MARYLAND CASUALTY CO. C. A. 4th Cir. Certiorari denied. Reported below: 822 F. 2d 1348.

No. 87–753. ROSETTI *v.* AVONDALE SHIPYARDS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 821 F. 2d 1083.

No. 87–754. COOMBE, DEPUTY COMMISSIONER FOR FACILITY OPERATIONS, NEW YORK DEPARTMENT OF CORRECTIONS *v.* JENKINS. C. A. 2d Cir. Certiorari denied. Reported below: 821 F. 2d 158.

No. 87–755. ARCWEL CORP. *v.* SOUTHWEST MARINE, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 816 F. 2d 468.

No. 87–762. EWERS *v.* BOARD OF COUNTY COMMISSIONERS OF COUNTY OF CURRY. C. A. 10th Cir. Certiorari denied. Reported below: 802 F. 2d 1242.

No. 87–763. ELZEY *v.* ARCHER ET AL. Ct. App. Ind. Certiorari denied. Reported below: 500 N. E. 2d 1253.

No. 87–766. CUNNINGHAM ET UX., ADMINISTRATORS OF THE ESTATE OF CUNNINGHAM *v.* INSURANCE COMPANY OF NORTH AMERICA. Sup. Ct. Pa. Certiorari denied. Reported below: 515 Pa. 486, 530 A. 2d 407.

No. 87–772. IN RE YOUNG. C. A. 6th Cir. Certiorari denied.

No. 87–773. ALLEN ET AL. *v.* BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITIES AND COLLEGES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 87–776. TRANSPORTATION COMMUNICATIONS UNION *v.* BALTIMORE & OHIO RAILROAD CO. C. A. 4th Cir. Certiorari denied. Reported below: 813 F. 2d 1227.

No. 87-777. KROWITZ *v.* DEPARTMENT OF AGRICULTURE, UNITED STATES FOREST SERVICE. C. A. 6th Cir. Certiorari denied. Reported below: 826 F. 2d 1063.

No. 87-778. MGA, INC. *v.* GENERAL MOTORS CORP. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 827 F. 2d 729.

No. 87-782. WESNER *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL UNION NO. 764, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 822 F. 2d 54.

No. 87-783. CORDOVA CLAY CO., INC. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 825 F. 2d 1471.

No. 87-785. DONOVAN *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 530 A. 2d 1128.

No. 87-788. HMK CORP. *v.* WALSEY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 828 F. 2d 1071.

No. 87-790. JOHNSON *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 87-793. SHAW *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 831 F. 2d 280.

No. 87-794. PENMAN *v.* INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES & MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, PUBLICISTS GUILD, LOCAL 818. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 87-795. HENEIN *v.* SAUDI ARABIAN PARSONS LTD. C. A. 9th Cir. Certiorari denied. Reported below: 818 F. 2d 1508.

No. 87-797. POLLAK *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 130 App. Div. 2d 911, 516 N. Y. S. 2d 511.

No. 87-798. POLLAK *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 130 App. Div. 2d 908, 516 N. Y. S. 2d 509.

No. 87–799. LINDSAY, DBA MAC ADVERTISING CO., ET AL. *v.* CITY OF SAN ANTONIO. C. A. 5th Cir. Certiorari denied. Reported below: 821 F. 2d 1103.

No. 87–802. LOMAR WHOLESALE GROCERY, INC. *v.* DIETER'S GOURMET FOODS, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 824 F. 2d 582.

No. 87–805. FLEMING *v.* GIBSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 826 F. 2d 1059.

No. 87–806. OLSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 830 F. 2d 195.

No. 87–807. LATELLA *v.* JACKSON, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 817 F. 2d 12.

No. 87–809. BULLARD *v.* NORTHCUTT ET AL. C. A. 10th Cir. Certiorari denied.

No. 87–811. KORBEL *v.* CALIFORNIA (two cases). App. Dept., Super. Ct. Cal., Los Angeles County. Certiorari denied.

No. 87–812. LEVY *v.* EXXON CORP. C. A. 5th Cir. Certiorari denied. Reported below: 823 F. 2d 550.

No. 87–817. BAYER *v.* PAYNE, SECRETARY OF REVENUE FOR SOUTH DAKOTA. Sup. Ct. S. D. Certiorari denied. Reported below: 411 N. W. 2d 129.

No. 87–829. WADE *v.* DISTRICT OF COLUMBIA COURT OF APPEALS. Ct. App. D. C. Certiorari denied. Reported below: 526 A. 2d 936.

No. 87–834. CURCIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 826 F. 2d 196.

No. 87–839. ELDRIDGE *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 87–842. HARRIS METHODIST H–E–B BOARD OF TRUSTEES ET AL. *v.* JATOI. C. A. 5th Cir. Certiorari denied. Reported below: 807 F. 2d 1214 and 819 F. 2d 545.

No. 87–848. COMMISSIONER, MASSACHUSETTS DEPARTMENT OF MENTAL HEALTH, ET AL. *v.* ROGERS ET AL. C. A. 1st Cir. Certiorari denied.

No. 87–857. POHLOT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 827 F. 2d 889.

No. 87–861. TEAMSTERS LOCAL NO. 728 *v.* MIMS. C. A. 11th Cir. Certiorari denied. Reported below: 821 F. 2d 1568.

No. 87–866. GILLETTE *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 25 M. J. 243.

No. 87–867. NEELEY *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 25 M. J. 105.

No. 87–880. GENERAL ELECTRIC CO. *v.* M/V NEDLLOYD ROUEN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 817 F. 2d 1022.

No. 87–881. GROSS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 827 F. 2d 770.

No. 87–887. 7.92 ACRES OF LAND ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 831 F. 2d 281.

No. 87–888. RAFFERTY, SUPERINTENDENT, RAHWAY STATE PRISON, ET AL. *v.* CARTER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 826 F. 2d 1299.

No. 87–890. WALKER *v.* CONSUMERS POWER CO. C. A. 6th Cir. Certiorari denied. Reported below: 824 F. 2d 499.

No. 87–908. RYAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 825 F. 2d 853.

No. 87–923. ROBILOTTO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 828 F. 2d 940.

No. 87–5065. WERNERT *v.* ARN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 819 F. 2d 613.

No. 87–5201. TYLER *v.* WADMAN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 822 F. 2d 1093.

No. 87–5228. TATE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 821 F. 2d 1328.

No. 87–5248. CARABALLO-GARCIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 820 F. 2d 1229.

No. 87–5261. EAGLE HAWK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 815 F. 2d 1213.

No. 87–5265. KITCHENS-SHUMOW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 819 F. 2d 1146.

No. 87–5272. SMITH *v.* MCMILLIAN ET AL. C. A. 5th Cir. Certiorari denied.

No. 87–5302. MONAHAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 820 F. 2d 1228.

No. 87–5311. MORRIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 820 F. 2d 408.

No. 87–5320. RODRIGUEZ-PAGAN *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 1st Cir. Certiorari denied. Reported below: 819 F. 2d 1.

No. 87–5335. NEWMAN *v.* TERRY, ATTORNEY GENERAL OF VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 819 F. 2d 1138.

No. 87–5401. DANNER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 820 F. 2d 1166.

No. 87–5407. MARTINELLI *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 817 F. 2d 1499.

No. 87–5434. GRIZZLE *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 293 S. C. 19, 358 S. E. 2d 388.

No. 87–5458. PHILLIPS *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 822 F. 2d 63.

No. 87–5489. BENNETT *v.* NORTH AMERICAN VAN LINES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 826 F. 2d 1054.

No. 87–5517. CASPER *v.* RYAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 822 F. 2d 1283.

No. 87–5532. CHAMBERS *v.* GETTY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 822 F. 2d 1094.

No. 87–5550. MYERS *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 826 F. 2d 11.

No. 87–5661. ALOMIA-RIASCOS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 825 F. 2d 769.

No. 87–5667. JACKSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 262 U. S. App. D. C. 294, 824 F. 2d 21.

No. 87–5703. THOMAS *v.* NORBAR, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 822 F. 2d 1089.

No. 87–5724. MARTIN *v.* PEREZOUS ET AL. C. A. 3d Cir. Certiorari denied.

No. 87–5729. LEPISCOPO *v.* ROBINS ET AL. C. A. 10th Cir. Certiorari denied.

No. 87–5732. FAY *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. D. C. Cir. Certiorari denied.

No. 87–5734. SINDRAM *v.* READING. Ct. App. D. C. Certiorari denied.

No. 87–5735. RILEY *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 87–5737. WILLIAMS *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 87–5739. MUHAMMAD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 824 F. 2d 214.

No. 87–5742. MCDONOUGH *v.* TRUSTEES OF THE UNIVERSITY SYSTEM OF NEW HAMPSHIRE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 823 F. 2d 543.

No. 87–5743. PHILLIPS *v.* HERNANDEZ. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 507 So. 2d 277.

No. 87–5744. CONNELLY *v.* ARMCO FINANCIAL CORP. ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 128 App. Div. 2d 1030, 512 N. Y. S. 2d 611.

No. 87–5745. OLAN *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 87–5751. BROWN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 87–5753. HAYNES *v.* BUTLER, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 825 F. 2d 921.

No. 87–5757. CAMPOS *v.* LEFEVRE, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 825 F. 2d 671.

No. 87–5761. MACGUIRE *v.* ADMINISTRATOR OF THE RAPPAHANNOCK SECURITY COMPLEX. Sup. Ct. Va. Certiorari denied.

No. 87–5766. WILLIAMS *v.* ABSHIRE, SUPERINTENDENT, RIVERSIDE CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 822 F. 2d 60.

No. 87–5769. NOLL *v.* PETROVSKY, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 828 F. 2d 461.

No. 87–5770. MULAZIM *v.* MICHIGAN DEPARTMENT OF CORRECTIONS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 831 F. 2d 296.

No. 87–5771. CHATFIELD *v.* COLORADO. Sup. Ct. Colo. Certiorari denied.

No. 87–5774. SULLIVAN *v.* SILVERTHORN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 817 F. 2d 757.

No. 87–5775. MILLER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 87–5776. MONROE *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 824 F. 2d 973.

No. 87–5777. MEJIA-SALCEDO *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 820 F. 2d 1221.

No. 87–5779. MCLAUGHLIN *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 86 N. C. App. 112, 356 S. E. 2d 836.

No. 87–5782. BECKER *v.* ADAMS DRUG CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 819 F. 2d 32.

No. 87–5783. BROWN *v.* NEWSOME, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 828 F. 2d 773.

No. 87–5784. LEE *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 516 Pa. 613, 531 A. 2d 779.

No. 87–5785. NURSE *v.* SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 857 F. 2d 1461.

No. 87–5786. SULLEN *v.* DAVIS, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 829 F. 2d 1131.

No. 87–5791. HALL *v.* VIRGINIA. Ct. App. Va. Certiorari denied.

No. 87–5797. VERHAGEN *v.* NEW YORK STATE OFFICE OF COURT ADMINISTRATION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 857 F. 2d 1462.

No. 87–5801. ARUNGA *v.* JOHNSON ET AL. C. A. D. C. Cir. Certiorari denied.

No. 87–5804. CAVE *v.* SHORTRIDGE ET AL. C. A. 8th Cir. Certiorari denied.

No. 87–5814. WILLIS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 510 N. E. 2d 1354.

No. 87–5823. FELLAY *v.* SECRETARY OF THE ARMY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 826 F. 2d 1069.

No. 87–5825. KRAHN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 87–5827. MACKAY *v.* GOSS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 825 F. 2d 407.

No. 87–5828. NELSON *v.* BLUDWORTH ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 824 F. 2d 973.

No. 87–5829. SHOCKEY *v.* TATE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE. C. A. 6th Cir. Certiorari denied.

No. 87–5830. WOODLIFF *v.* HOPKINS, COMMISSIONER, MARYLAND DIVISION OF CORRECTION. C. A. 4th Cir. Certiorari denied. Reported below: 828 F. 2d 18.

No. 87–5831. THOMAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 824 F. 2d 974.

No. 87–5838. BERRISFORD *v.* WOOD, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 826 F. 2d 747.

No. 87–5839. DANIELS *v.* SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 825 F. 2d 410.

No. 87–5841. HENRY *v.* ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 87–5842. OWCHARIW *v.* KORN. Sup. Ct. N. J. Certiorari denied.

No. 87–5844. DEBARDELEBEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 823 F. 2d 549.

No. 87–5848. LEOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 826 F. 2d 10.

No. 87–5850. BURGESS *v.* BROWN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 828 F. 2d 17.

No. 87–5851. TOLBERT *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 511 So. 2d 1368.

No. 87–5853. PROCTOR *v.* BACKRACH CLOTHING, INC., ET AL. C. A. 8th Cir. Certiorari denied.

No. 87–5854. MURR *v.* OHIO. Ct. App. Ohio, Sandusky County. Certiorari denied.

No. 87–5855. ROBERSON *v.* NORRIS ET AL. C. A. 8th Cir. Certiorari denied.

No. 87–5856. WILLIAMS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 87–5857. WILSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 87–5858. MARTIN *v.* HAYES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 36.

No. 87–5859. SEBETICH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 776 F. 2d 412.

No. 87–5861. BELL *v.* THURMAN, SUPERINTENDENT, CALIFORNIA INSTITUTION FOR MEN, ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 87–5862. BRYAN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 515 Pa. 618, 531 A. 2d 427.

No. 87–5863. CAUDLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 830 F. 2d 194.

No. 87–5864. GELABERT *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 87–5866. BROWN *v.* BOWLES, SHERIFF, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 822 F. 2d 57.

No. 87–5867. NELSON *v.* HOKES, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 831 F. 2d 284.

No. 87–5874. BROWN *v.* QUILIAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 829 F. 2d 30.

No. 87–5881. PEDRO *v.* OREGON BOARD OF PAROLE. C. A. 9th Cir. Certiorari denied. Reported below: 825 F. 2d 1396.

No. 87–5886. MORRIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 827 F. 2d 1348.

No. 87–5887. YEPEZ-URIAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 823 F. 2d 555.

No. 87–5889. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 819 F. 2d 605.

No. 87–5894. BENTLY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 87–5895. WALLACE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 826 F. 2d 1061.

No. 87–5899. SMITH *v.* COLEMAN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 833 F. 2d 1008.

No. 87–5900. MICKENS *v.* DUCKWORTH, SUPERINTENDENT, INDIANA STATE PRISON, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 826 F. 2d 1067.

No. 87–5906. BEECHAM *v.* SCROGGY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 830 F. 2d 193.

No. 87–5907. GLIDEWELL *v.* BURDEN, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 822 F. 2d 1027.

No. 87–5908. DICE *v.* BOLDEN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 816 F. 2d 679.

No. 87–5914. SPANN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 831 F. 2d 298.

No. 87–5924. GRAF *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 828 F. 2d 22.

No. 87–5925. DAVID *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 827 F. 2d 773.

No. 87–5934. GALONIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 831 F. 2d 288.

No. 87–5939. EVERETT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 87–5941. SUAREZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 831 F. 2d 283.

No. 87–5942. O'DELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 831 F. 2d 1069.

No. 87–5948. ANDERSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 87–5950. COFIELD *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. D. C. Cir. Certiorari denied.

No. 87–5952. JUDD *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 822 F. 2d 1096.

No. 87–5955. HOWARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 831 F. 2d 1064.

No. 87–5956. MIGUENS OLLER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 264 U. S. App. D. C. 406, 829 F. 2d 191.

No. 87–5959. MCNEIL *v.* DUNN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 820 F. 2d 1220.

No. 87–5960. HILL *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 516 Pa. 625, 532 A. 2d 436.

No. 87–5963. BROWNING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 825 F. 2d 853.

No. 87–5964. ASTLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 831 F. 2d 288.

No. 87–442. PENNSYLVANIA DRILLING CO., INC. *v.* SORBA. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 821 F. 2d 200.

No. 87–765. ARMSTRONG RUBBER CO. ET AL. *v.* LOCAL 670, UNITED RUBBER, CORK, LINOLEUM & PLASTIC WORKERS OF AMERICA, AFL–CIO, ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 822 F. 2d 613.

No. 87–532. GUGLIELMI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for writ of certiorari and reverse the judgment of conviction. Reported below: 819 F. 2d 451.

No. 87–545. PERALES, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES *v.* KRIEGER. Ct. App. N. Y. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 70 N. Y. 2d 637, 512 N. E. 2d 540.

No. 87–585. LINNE ET AL. *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioners to defer consideration of the petition for writ of certiorari and other relief denied. Certiorari denied. Reported below: 826 F. 2d 1061.

No. 87–702. DONG *v.* BOARD OF TRUSTEES OF LELAND STANFORD JUNIOR UNIVERSITY. Ct. App. Cal., 6th App. Dist. Cer-

tiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 191 Cal. App. 3d 1572, 236 Cal. Rptr. 912.

No. 87–767. SOLIMAN *v.* EBASCO SERVICES, INC. C. A. 2d Cir. Motion of respondent for damages denied. Certiorari denied. Reported below: 822 F. 2d 320.

No. 87–787. UNIVERSITY OF PITTSBURGH *v.* JACKSON. C. A. 3d Cir. Motion of respondent for costs and damages denied. Certiorari denied. Reported below: 826 F. 2d 230.

No. 87–5748. STEFFENS ET UX. *v.* WAGON WHEEL ASSOCIATES, INC., ET AL. Ct. App. Colo. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition.

No. 87–5762. CRAIG *v.* FLORIDA. Sup. Ct. Fla.;

No. 87–5768. PRESTON *v.* MISSOURI. Ct. App. Mo., Eastern Dist.;

No. 87–5790. WILLIAMS *v.* VIRGINIA. Sup. Ct. Va.;

No. 87–5792. ROGERS *v.* FLORIDA. Sup. Ct. Fla.;

No. 87–5818. POLLARD *v.* MISSOURI. Sup. Ct. Mo.; and

No. 87–5846. BELL *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: No. 87–5762, 510 So. 2d 857; No. 87–5768, 736 S. W. 2d 53; No. 87–5790, 234 Va. 168, 360 S. E. 2d 361; No. 87–5792, 511 So. 2d 526; No. 87–5818, 735 S. W. 2d 345; No. 87–5846, 293 S. C. 391, 360 S. E. 2d 706.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 86–1791. WARD *v.* SENTRY TITLE CO., INC., *ante*, p. 818;

No. 86–6950. MMOE *v.* CROTHERS ET AL., *ante*, p. 836;

No. 86–7077. DAINWOOD *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, *ante*, p. 953;

No. 87–262. STANTON *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, *ante*, p. 925;

No. 87–281. GOLDSTEIN *v.* CRAWFORD ET AL., *ante*, p. 943;

No. 87-286. U. S. TELECOM, INC., FKA U. S. TELEPHONE, INC., ET AL. *v.* SPEAKERS OF SPORT, INC., *ante*, p. 925;

No. 87-345. IN RE ASAM, *ante*, p. 909;

No. 87-390. IN RE ASAM, *ante*, p. 909;

No. 87-414. POLYAK *v.* BOSTON ET AL., *ante*, p. 919;

No. 87-433. VENCE ET AL. *v.* BOLIVAR COUNTY COMMUNITY ACTION PROGRAM, INC., ET AL., *ante*, p. 927;

No. 87-504. RICHENDOLLAR *v.* DIAMOND M DRILLING CO., INC., *ante*, p. 944;

No. 87-580. IN RE POLYAK, *ante*, p. 952;

No. 87-5072. D'AMARIO *v.* PROVIDENCE CIVIC CENTER AUTHORITY ET AL., *ante*, p. 859;

No. 87-5077. BROOKS *v.* LOUISIANA, *ante*, p. 947;

No. 87-5194. CULLY *v.* CUTLIP ET AL., *ante*, p. 899;

No. 87-5195. CULLY *v.* LUTHERAN MEDICAL CENTER, *ante*, p. 899;

No. 87-5257. WHITEHEAD *v.* ILLINOIS, *ante*, p. 933;

No. 87-5383. KURTZ *v.* KURTZ, *ante*, p. 916;

No. 87-5427. LILES *v.* OKLAHOMA, *ante*, p. 933;

No. 87-5445. PAYNE *v.* VIRGINIA, *ante*, p. 933;

No. 87-5456. PEDRAZA *v.* HEARD ET AL., *ante*, p. 930;

No. 87-5539. ADAMS *v.* FLORIDA, *ante*, p. 951; and

No. 87-5579. WILLIAMS *v.* CADILLAC INSURANCE CO. ET AL., *ante*, p. 957. Petitions for rehearing denied.

No. 87-5660. CORDEIRO *v.* CONNER ET AL., *ante*, p. 970. Petition for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

JANUARY 14, 1988

Dismissal Under Rule 53

No. 86-1621. AMERICAN STANDARD INC. ET AL. *v.* STEEL VALLEY AUTHORITY. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 809 F. 2d 1006.

JANUARY 15, 1988

Miscellaneous Order

No. A-532. TERRENCE K. *v.* UNITED STATES DEPARTMENT OF STATE. D. C. E. D. N. Y. Application for stay, presented

to JUSTICE BLACKMUN, and by him referred to the Court, denied. The order entered January 9, 1988, in this case is vacated.

JANUARY 19, 1988

Appeal Dismissed

No. 87-919. TIMES MIRROR CO. ET AL. *v.* CITY OF LOS ANGELES. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question. JUSTICE STEVENS took no part in the consideration or decision of this case. Reported below: 192 Cal. App. 3d 170, 237 Cal. Rptr. 346.

Certiorari Granted—Vacated and Remanded

No. 86-871. POTOMAC ELECTRIC POWER CO. *v.* CURRAN, ATTORNEY GENERAL OF MARYLAND, ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Deakins* v. *Monaghan*, *ante*, p. 193, and to consider the question of mootness. Reported below: 802 F. 2d 1527.

No. 86-2015. GENERAL ELECTRIC CO. *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Westfall* v. *Erwin*, *ante*, p. 292. Reported below: 813 F. 2d 1273.

No. 86-6678. PLATH *v.* SOUTH CAROLINA. Ct. Common Pleas of Beaufort County, S. C. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Yates* v. *Aiken*, *ante*, p. 211.

No. 86-6698. ARNOLD *v.* SOUTH CAROLINA. Ct. Common Pleas of Beaufort County, S. C. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Yates* v. *Aiken*, *ante*, p. 211.

No. 87-275. SPARKS *v.* CHARACTER AND FITNESS COMMITTEE OF KENTUCKY ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Forrester* v. *White*, *ante*, p. 219. Reported below: 818 F. 2d 541.

No. 87-299. CROOKS ET AL. *v.* MAYNARD, JUDGE. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded

for further consideration in light of *Forrester* v. *White*, *ante*, p. 219. Reported below: 820 F. 2d 329.

Miscellaneous Orders

No. ——. MCDONALD *v.* BLACK. Motion to direct the Clerk to file a petition for writ of certiorari out of time denied.

No. 109, Orig. OKLAHOMA ET AL. *v.* NEW MEXICO. It is ordered that Jerome C. Muys, Esq., of Washington, D. C., be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and the authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The compensation of the Master, the allowances to him, the compensation paid to his legal, technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses, including travel expenses, shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct. [For earlier order herein, see *ante*, p. 808.]

No. 85–1765. BANKERS LIFE & CASUALTY CO. *v.* CRENSHAW. Sup. Ct. Miss. [Probable jurisdiction noted, 480 U. S. 915.] Motion of appellant for leave to file a supplemental brief after argument granted. JUSTICE STEVENS took no part in the consideration or decision of this motion.

No. 86–1836. NEW YORK STATE CLUB ASSN., INC. *v.* CITY OF NEW YORK ET AL. Ct. App. N. Y. [Probable jurisdiction noted, *ante*, p. 812.] Motion of Licensing Board of the City of Boston for leave to file a brief as *amicus curiae* granted.

No. 87–59. UNITED STATES POSTAL SERVICE *v.* NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL–CIO. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 984.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 87–157. ALLIED TUBE & CONDUIT CORP. *v.* INDIAN HEAD, INC. C. A. 2d Cir. [Certiorari granted, *ante*, p. 814.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 87–354. ARIZONA *v.* ROBERSON. Ct. App. Ariz. [Certiorari granted, *ante*, p. 975.] Motion for appointment of counsel granted, and it is ordered that Robert L. Barrasso, Esq., of Tucson, Ariz., be appointed to serve as counsel for respondent in this case. Motion of petitioner to dispense with printing the joint appendix granted.

No. 87–660. PETERS ET AL. *v.* CITY OF SHREVEPORT. C. A. 5th Cir.; and

No. 87–1001. H. K. PORTER CO., INC. *v.* METROPOLITAN DADE COUNTY, FLORIDA, ET AL. C. A. 11th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 87–5269. OHSE *v.* HUGHES ET AL. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until February 9, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit a petition for writ of certiorari in compliance with Rule 33 of the Rules of this Court.

No. 87–5875. POPHAM *v.* CITY OF KENNESAW ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until February 9, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit a petition for writ of certiorari in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 87–5890. IN RE TRIPATI. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 87–920. MEYER, COLORADO SECRETARY OF STATE, ET AL. *v.* GRANT ET AL. Appeal from C. A. 10th Cir. Probable jurisdiction noted. Reported below: 828 F. 2d 1446.

Certiorari Granted

No. 87–626. SHERIDAN ET UX. *v.* UNITED STATES. C. A. 4th Cir. Certiorari granted. Reported below: 823 F. 2d 820.

No. 87–573. UNITED STATES *v.* TAYLOR. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 821 F. 2d 1377.

No. 87–5428. HOUSTON *v.* LACK, WARDEN. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 819 F. 2d 289.

Certiorari Denied

No. 86–833. DESCHAMBAULT ET AL. *v.* SOWELL. C. A. 11th Cir. Certiorari denied. Reported below: 791 F. 2d 170.

No. 86–862. POTTS ET AL. *v.* HEATHCOAT, ADMINISTRATRIX FOR THE ESTATE OF HEATHCOAT. C. A. 11th Cir. Certiorari denied. Reported below: 790 F. 2d 1540.

No. 87–413. HUGHES ET AL. *v.* OHSE. C. A. 7th Cir. Certiorari denied. Reported below: 816 F. 2d 1144.

No. 87–492. COLLYER *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 24 M. J. 454.

No. 87–502. ARCO OIL & GAS CO. *v.* WILLISTON BASIN INTERSTATE PIPELINE CO. ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 259 U. S. App. D. C. 473, 816 F. 2d 777.

No. 87–515. UMC ELECTRONICS CO. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 816 F. 2d 647.

No. 87–529. POLAKOF ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 820 F. 2d 321.

No. 87–535. DEBOCK *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 512 So. 2d 164.

No. 87–570. COLAFELLA ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 821 F. 2d 946.

No. 87–613. BRODY, JUDGE, UNITED STATES BANKRUPTCY COURT *v.* GUERCIO. C. A. 6th Cir. Certiorari denied. Reported below: 814 F. 2d 1115.

No. 87–643. REPP *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 24 M. J. 447.

No. 87–650. NIXON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 816 F. 2d 1022.

No. 87–651. FAKHOURY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 819 F. 2d 1415.

No. 87–656. NELSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 826 F. 2d 310.

No. 87–668. CHELSEA LABORATORIES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 825 F. 2d 680.

No. 87–675. JOHNSTON *v.* MAKOWSKI, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 823 F. 2d 387.

No. 87–680. MILLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 829 F. 2d 33.

No. 87–692. STARK *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 24 M. J. 381.

No. 87–693. OWEN *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 24 M. J. 390.

No. 87–742. SELIGMAN & ASSOCIATES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 808 F. 2d 1155.

No. 87–792. EDEN SERVICES ET AL. *v.* RYKO MANUFACTURING CO. C. A. 8th Cir. Certiorari denied. Reported below: 823 F. 2d 1215.

No. 87–800. RICHIE, INDIVIDUALLY AND DBA BROCKMAN MUSIC, ET AL. *v.* THOMPSON. C. A. 9th Cir. Certiorari denied. Reported below: 820 F. 2d 408.

No. 87–804. BEASON *v.* BOARD OF SCHOOL DIRECTORS OF THE CITY OF MILWAUKEE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 826 F. 2d 1068.

No. 87–813. BRANDT ET AL., DBA BRANDT CONSTRUCTION CO. *v.* UPTOWN NATIONAL BANK OF MOLINE. C. A. 7th Cir. Certiorari denied. Reported below: 826 F. 2d 643.

No. 87–816. JOAN G. *v.* ORANGE COUNTY SOCIAL SERVICES AGENCY. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 87–822. FONAR CORP. ET AL. *v.* JOHNSON & JOHNSON ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 821 F. 2d 627.

No. 87–823. LUCAS *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 25 M. J. 9.

No. 87–824. RICE *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 25 M. J. 35.

No. 87–831. ABEYTA *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 25 M. J. 97.

No. 87–850. HART SCHAFFNER & MARX ET AL. *v.* SCHULTZ ET VIR, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR DAUGHTER, SCHULTZ. C. A. 5th Cir. Certiorari denied. Reported below: 826 F. 2d 10.

No. 87–855. CITY OF FAYETTEVILLE, NORTH CAROLINA *v.* SPELL. C. A. 4th Cir. Certiorari denied. Reported below: 824 F. 2d 1380.

No. 87–856. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. *v.* RANDALL ET UX. C. A. D. C. Cir. Certiorari denied. Reported below: 261 U. S. App. D. C. 138, 820 F. 2d 1317.

No. 87–862. VANHERBERT *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied.

No. 87–869. NORTH *v.* WALSH. C. A. D. C. Cir. Certiorari denied. Reported below: 264 U. S. App. D. C. 265, 829 F. 2d 50.

No. 87–874. SHASHATY *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 205 Conn. 39, 529 A. 2d 1308.

No. 87–886. HARGROVE *v.* BOARD OF TRUSTEES OF THE MARYLAND RETIREMENT SYSTEM. Ct. App. Md. Certiorari denied. Reported below: 310 Md. 406, 529 A. 2d 1372.

No. 87–896. FOSTER *v.* PEDDICORD. C. A. 4th Cir. Certiorari denied. Reported below: 826 F. 2d 1370.

No. 87–899. OGBORNE *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 366 Pa. Super. 641, 526 A. 2d 1235.

No. 87–951. ABBOTT *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 503 N. E. 2d 1265.

No. 87–957. TVL CORP. *v.* SPANISH INTERNATIONAL COMMUNICATIONS CORP. C. A. 9th Cir. Certiorari denied. Reported below: 819 F. 2d 1145.

No. 87–959. MILLER *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 826 F. 2d 10.

No. 87–990. RISER *v.* LASALLE PARISH SCHOOL BOARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 826 F. 2d 10.

No. 87–5470. ARTHUR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 822 F. 2d 60.

No. 87–5560. VILLALOBOS-LORDUIZ ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 822 F. 2d 1008.

No. 87–5561. TRIPATI *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 784 F. 2d 345.

No. 87–5578. BROWN *v.* NEWSOME, SUPERINTENDENT, GEORGIA STATE PRISON, ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 257 Ga. XXVI, 359 S. E. 2d 918.

No. 87–5589. PATTERSON *v.* REDMAN. C. A. 6th Cir. Certiorari denied. Reported below: 826 F. 2d 1065.

No. 87–5599. DINICOLA *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 348 Pa. Super. 401 and 405, 502 A. 2d 604 and 606.

No. 87–5600. BANNER *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 87–5646. OGAMI *v.* HAWAII. Sup. Ct. Haw. Certiorari denied.

No. 87–5652. HURLEY *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 154 Ariz. 124, 741 P. 2d 257.

No. 87–5697. COX *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 826 F. 2d 1518.

No. 87–5736. MINCE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 828 F. 2d 771.

No. 87–5847. LYONS *v.* DEPARTMENT OF THE ARMY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 824 F. 2d 970.

No. 87–5865. FAIRLEY *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 87–5879. FRAZIER *v.* RAILROAD RETIREMENT BOARD. C. A. 9th Cir. Certiorari denied.

No. 87–5882. BAILEY *v.* RIESS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 833 F. 2d 309.

No. 87–5883. BAILEY *v.* EDWARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 833 F. 2d 309.

No. 87–5893. ABERNATHY *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 87–5896. GERMAN *v.* SUNDOWN VITAMINS, INC., ET AL. C. A. 5th Cir. Certiorari denied.

No. 87–5897. STANLEY ET UX. *v.* TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 824 F. 2d 971.

No. 87–5898. STEARNS-MILLER *v.* SOUTH CAROLINA DEPARTMENT OF CORRECTIONS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 36.

No. 87–5901. RONSON *v.* COMMISSIONER OF CORRECTION OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 823 F. 2d 545.

No. 87–5902. UNDERWOOD *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 828 F. 2d 1081.

No. 87–5905. JONES *v.* GRISWOLD, ACTING WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 832 F. 2d 1265.

No. 87–5910. TELEPO *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 87–5911. TURNER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 87–5912. WELLS *v.* HARDY ET AL. C. A. 5th Cir. Certiorari denied.

No. 87–5918. TERRY *v.* MORGAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 818 F. 2d 32.

No. 87–5922. GARDNER *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 829 F. 2d 1125.

No. 87–5927. STRONG *v.* MERCANTILE TRUST CO., N. A. C. A. 8th Cir. Certiorari denied. Reported below: 816 F. 2d 429.

No. 87–5928. WEBER *v.* NORDMAN, CORMANY, HAIR & COMPTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 829 F. 2d 41.

No. 87–5944. NOLL *v.* WILKERSON ET AL. C. A. 8th Cir. Certiorari denied.

No. 87–5949. BRATCHER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 833 F. 2d 69.

No. 87–5977. BERKMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 833 F. 2d 307.

No. 87–5986. SAVAGE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 831 F. 2d 298.

No. 87–5991. THOMAS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 87–5994. GLASS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 831 F. 2d 1069.

No. 87–5998. ELRICH ET AL. *v.* WRIGHT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 829 F. 2d 38.

No. 87–6009. MORE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 830 F. 2d 1130.

No. 87–6015. FALCON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 832 F. 2d 1262.

No. 87–6027. ERVIN *v.* TRAXLER, JUDGE, SEVENTH JUDICIAL CIRCUIT OF SOUTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 35.

No. 87–6029. WHITEHEAD *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 511 N. E. 2d 284.

No. 87–6065. KELLEY *v.* HAIL ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 823 F. 2d 557.

No. 87–6097. HUGHES *v.* SOUTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 35.

No. 87–388. LORMAND *v.* ARIES MARINE CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 820 F. 2d 1222.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

The issue here is the proper definition of seaman status under the Jones Act. Petitioner, an employee for a welding company, was injured while working aboard a barge. He brought suit in District Court against his employer and the owner of the barge. The suit was unsuccessful, and in particular the District Court granted summary judgment for petitioner's employer on the Jones Act claim, ruling that petitioner was not a "seaman" as that term is used in 46 U. S. C. § 688. The Fifth Circuit affirmed on appeal, adhering to the test for determining seaman status that it had recently stated in an en banc decision. *Lormand* v. *Superior Oil Co.*, 845 F. 2d 536, 539 (1987), citing *Barrett* v. *Chevron U. S. A., Inc.*, 781 F. 2d 1067 (CA5 1986) (en banc). Judge Rubin stated that he concurred in the opinion only because he was bound to do so by the *Barrett* decision, though he continued to adhere to his dissent in *Barrett*. Judge Brown concurred separately on a different issue.

In *Barrett*, the Fifth Circuit as a whole reaffirmed its adherence to the test it had followed for almost 30 years, which states that to qualify as a "seaman" a person must either be assigned permanently to a vessel or perform a substantial part of his work aboard it, and also that the person's duties or capacities must contribute to the function of the vessel or to the accomplishment of its mission. *Barrett*, *supra*, at 1070–1074; *Offshore Co.* v. *Robison*, 266 F. 2d 769 (CA5 1959). Of the eight judges who formed the major-

ity in *Barrett*, however, four concurred specially, noting that they joined the majority only to establish a firm rule but would have preferred to adopt the test formulated by the Seventh Circuit, which puts the issue of seaman status to a jury whenever the person "had a more or less permanent connection with a vessel in navigation" and "made a significant contribution to the maintenance, operation, or welfare of the transportation function of the vessel." *Johnson* v. *John F. Beasley Constr. Co.*, 742 F. 2d 1054, 1063, cert. denied, 469 U. S. 1211 (1985). Judge Rubin dissented, joined by five other judges, stating that the *Robison* test should be supplemented by considering the person's status not only in light of his permanent job assignment but also in light of any assignment imposed on him for a hitch of more limited duration. *Barrett*, *supra*, at 1077–1078.

The test used by the Fifth Circuit to determine seaman status is inconsistent with the test used by the Seventh Circuit. In addition, the Third Circuit has formulated the second part of the *Robison* test as whether the person is aboard the vessel "primarily to aid in its navigation." *Simko* v. *C. & C. Marine Maintenance Co.*, 594 F. 2d 960, 964, cert. denied, 444 U. S. 833 (1979). The split among the Circuits on this issue warrants our granting certiorari.

No. 87–624. CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE *v.* SECRETARY OF TRANSPORTATION OF PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE and JUSTICE MARSHALL would grant certiorari. Reported below: 827 F. 2d 916.

No. 87–734. KAY ET AL. *v.* DAVID DOUGLAS SCHOOL DISTRICT NO. 40 ET AL. Sup. Ct. Ore. Certiorari denied. Reported below: 303 Ore. 574, 738 P. 2d 1389.

JUSTICE WHITE, dissenting.

This case presents the difficult question whether a plaintiff can recover attorney's fees under 42 U. S. C. § 1988 when the underlying action has become moot because of compliance by the defendant with a court order. Here petitioners challenged respondents' plans to incorporate formal public prayer in the commencement exercises of a public high school. After numerous unsuccessful attempts to persuade respondents to drop the public prayer, petitioners brought suit in state court, challenging

respondents' plans as violative of the State and Federal Constitutions and seeking attorney's fees under state law and § 1988. The trial court made an oral ruling that the planned public prayer violated state and federal law, and consequently respondents dropped the public prayer from the commencement exercises. About a month after the commencement exercises, the trial court issued a written order reaffirming the earlier oral decision and awarding attorney's fees. The Oregon Court of Appeals affirmed the holding that the planned public prayer violated the State Constitution and affirmed the award of attorney's fees under § 1988. 79 Ore. App. 384, 719 P. 2d 875 (1986).

The Oregon Supreme Court reversed the Court of Appeals and remanded the case to the trial court to vacate the judgment. 303 Ore. 574, 738 P. 2d 1389 (1987). The court reasoned that there was no longer a justiciable controversy because petitioners had already graduated, public prayer was not included in their commencement exercises, and petitioners did not seek to enjoin future repetitions of this challenged conduct. The court held that under Oregon law, the oral order was not an effective preliminary injunction or final order until it was reduced to writing and by the time it was rendered in writing the controversy was no longer justiciable.

The Oregon Supreme Court's decision that a § 1988 fees award is not available in this case creates a conflict in the courts over the award of fees when the underlying action is rendered unreviewable after it has been filed. The courts are in agreement that a § 1988 fees award is proper where the defendant "voluntarily" complies under threat of the lawsuit, for such compliance, although mooting the lawsuit, shows acquiescence in the plaintiff's position. *E. g.*, *Martin* v. *Heckler*, 773 F. 2d 1145, 1148–1149 (CA11 1985) (en banc); *DeMier* v. *Gondles*, 676 F. 2d 92 (CA4 1982); see *Hewitt* v. *Helms*, 482 U. S. 755, 761 (1987) ("[I]f the defendant, under pressure of the lawsuit, alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed"). The more difficult question presented by this case is whether a defendant's "involuntary" compliance with a seemingly valid court order supports an award of fees under § 1988, where such compliance, under fear of contempt, moots a lawsuit such as this one but does not demonstrate acquiescence in plaintiff's position. The decision here denying an award of fees under § 1988 conflicts with decisions from

three Circuits upholding § 1988 fees awards in the involuntary-compliance-plus-mootness context. *Grano* v. *Barry*, 251 U. S. App. D. C. 289, 294–295, 783 F. 2d 1104, 1109–1110 (1986); *Williams* v. *Alioto*, 625 F. 2d 845, 847–848 (CA9 1980) *(per curiam)*, cert. denied, 450 U. S. 1012 (1981); *Doe* v. *Marshall*, 622 F. 2d 118, 119–120 (CA5 1980), cert. denied, 451 U. S. 993 (1981).

The federal issue raised by this petition for certiorari is substantial and requires resolution by this Court. An award of fees under § 1988 to these petitioners may be appropriate, for petitioners were in one sense "prevailing parties": although the dispute was later held to be moot, the seemingly valid oral ruling by the trial court gave them all that they sought. On the other hand, there has never been a final determination, tested on appeal, that petitioners' position was legally sound. Arguably, respondents should not be forced to bear an award of fees where they have never been finally determined to have violated the Federal Constitution or laws and have steadfastly maintained the contrary position. And arguably, under *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39–40 (1950), no party should be prejudiced by a decision which in the statutory scheme for judicial decisionmaking was only preliminary. The resolution of these competing concerns is plainly important to determining who is a "prevailing party" under § 1988. Because of the conflict in the courts over this question of federal law, I would grant certiorari.

No. 87–5570. FORD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 824 F. 2d 1430.

JUSTICE WHITE, dissenting.

The issue here is whether it is consistent with the Federal Magistrates Act for a district court to delegate jury selection to a magistrate. In this case, petitioner was convicted by a federal jury on the felony charge of stealing Government property. A United States Magistrate presided over the selection of the jury which, despite the relatively routine nature of the charges, took about four hours and was not free of difficulty. Neither the Government nor defense counsel expressly consented or objected to the Magistrate's presiding over the *voir dire* proceedings. On appeal, petitioner argued that the District Court violated the Federal Magistrates Act, 28 U. S. C. §§ 631–639 (1982 ed. and Supp. III), by allowing the Magistrate to preside over jury selection. A

panel of the Fifth Circuit rejected this argument. 797 F. 2d 1329 (1986), cert. denied, 479 U. S. 1070 (1987).

The case was accepted for rehearing en banc, and in a split decision the full court affirmed, though on other grounds. It ruled that the Act does not grant a district court the power to delegate jury selection to a magistrate as an "additional dut[y]" under 28 U. S. C. § 636(b)(3), and that the opposite construction of this section would pose "grave constitutional issues." 824 F. 2d 1430, 1435 (1987). Nonetheless, it affirmed the conviction because petitioner had failed to object to this procedure at trial and the violation did not amount to plain error because it did not render the trial fundamentally unfair. Judge Jolly concurred in the result, concluding that under the Act and the Constitution a magistrate may conduct *voir dire* at a jury trial unless the defendant objects. *Id.*, at 1439. Judge Rubin dissented, joined by three other judges, concluding that it does not violate either the Act or the Constitution for a magistrate to conduct the *voir dire* proceedings in a criminal trial. *Id.*, at 1440–1448.

If the decision below is incorrect, and this use of the magistrate violates either the Act or the Constitution, then it is not obvious that this violation can be dismissed under the "plain error" doctrine. And the position of the Fifth Circuit on this issue conflicts with two decisions of the Ninth Circuit. *United States* v. *Peacock*, 761 F. 2d 1313, 1317–1319, cert. denied, 474 U. S. 847 (1985); *United States* v. *Bezold*, 760 F. 2d 999, 1001–1003 (1985), cert. denied, 474 U. S. 1063 (1986). See also *United States* v. *Rivera-Sola*, 713 F. 2d 866, 872–873 (CA1 1983) (dictum). The split among the Circuits on this issue warrants our granting certiorari.

No. 87–5620. HOO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 825 F. 2d 667.

JUSTICE WHITE, dissenting.

The issue presented by this petition for certiorari is what is the correct test for determining if prosecutorial preindictment delay amounts to a violation of the Due Process Clause of the Fifth Amendment. See *United States* v. *Lovasco*, 431 U. S. 783 (1977). In this case, the petitioner argued that he was prejudiced by the prosecutorial delay in filing the indictment against him, for it was filed 13 days after he turned 21 years of age, and consequently he was ineligible for the protections of the Federal Juvenile Delin-

quency Act, 18 U. S. C. § 5031 *et seq.* The Second Circuit held that there was no due process violation because petitioner "made no showing of an improper prosecutorial motive." 825 F. 2d 667, 671 (1987). Other Circuits have similarly required a showing of prosecutorial misconduct designed to obtain a tactical advantage over the defendant or to advance some other impermissible purpose in order to establish a due process violation. *United States* v. *Ismaili*, 828 F. 2d 153, 166 (CA3 1987); *United States* v. *Lebron-Gonzalez*, 816 F. 2d 823, 831 (CA1), cert. denied, *ante*, pp. 843, 857; *United States* v. *Caporale*, 806 F. 2d 1487, 1514 (CA11 1986), cert. denied, 482 U. S. 917, 483 U. S. 1021 (1987); *United States* v. *Jenkins*, 701 F. 2d 850, 854–855 (CA10 1983). Two Circuits, however, have concluded that intentional misconduct is not the *sine qua non* for a due process violation from prosecutorial preindictment delay, and instead they hold that the proper inquiry is to balance the prejudice to the defendant against the Government's justification for delay. *United States* v. *Valentine*, 783 F. 2d 1413, 1416 (CA9 1986); *United States* v. *Automated Medical Laboratories, Inc.*, 770 F. 2d 399, 403–404 (CA4 1985). Exemplifying the significant disagreement in the lower courts over the proper test, panels in the Fifth and Seventh Circuits have acknowledged conflicts between decisions from their own Circuits on this issue. *Dickerson* v. *Louisiana*, 816 F. 2d 220, 229, n. 16 (CA5), cert. denied, *ante*, p. 956; *United States* v. *Hollins*, 811 F. 2d 384, 387–388 (CA7 1987). The continuing conflict among the Circuits on this important question of constitutional law requires resolution by this Court; I would grant certiorari.

No. 87–5772. LEWIS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari before judgment denied.

No. 87–5904. TRAPANI *v.* CBS RECORDS, INC., ET AL. C. A. 6th Cir. Certiorari before judgment denied.

No. 87–5795. SMITH *v.* KENTUCKY. Sup. Ct. Ky.;

No. 87–5877. CLANTON *v.* BAIR, WARDEN, ET AL. C. A. 4th Cir.;

No. 87–5885. RESNOVER *v.* INDIANA. Sup. Ct. Ind.;

No. 87–5892. BARNES *v.* VIRGINIA. Sup. Ct. Va.;

No. 87–5909. STOUFFER *v.* OKLAHOMA. Ct. Crim. App. Okla.;

No. 87–5913. VAN WOUDENBERG *v.* OKLAHOMA. Ct. Crim. App. Okla.; and

No. 87-6002. BYRD *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: No. 87-5795, 734 S. W. 2d 437; No. 87-5877, 826 F. 2d 1354; No. 87-5885, 507 N. E. 2d 1382; No. 87-5892, 234 Va. 130, 360 S. E. 2d 196; No. 87-5909, 738 P. 2d 1349; No. 87-6002, 32 Ohio St. 3d 79, 512 N. E. 2d 611.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 87-5997. HASKINS *v.* VIRGINIA. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE dissents and would grant certiorari to resolve conflicts among the Circuits. See *Kerr* v. *Finkbeiner*, 474 U. S. 929 (1985) (WHITE, J., dissenting from denial of certiorari). Reported below: 828 F. 2d 17.

Rehearing Denied

No. 86-7164. MCDOWELL *v.* UNITED STATES, *ante*, p. 980;

No. 87-472. RICHARDSON ET AL. *v.* LANE ET AL., *ante*, p. 953;

No. 87-520. HANCICH *v.* GOPOIAN ET AL., *ante*, p. 964;

No. 87-5530. LAUDERDALE *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA, ET AL., *ante*, p. 956;

No. 87-5632. MINGLEDOLPH *v.* MCKEAN, CHAIRMAN OF THE POSTAL BOARD, ET AL., *ante*, p. 967;

No. 87-5634. WOOL *v.* RICHARDSON ET AL., *ante*, p. 960;

No. 87-5644. LUNZ *v.* HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, ET AL., *ante*, p. 958; and

No. 87-5721. BYNUM *v.* BUREAU OF PRISONS, *ante*, p. 979. Petitions for rehearing denied.

No. 85-429. EXXON CORP. *v.* UNITED STATES ET AL., 474 U. S. 1105. Motion for leave to file petition for rehearing denied.

JANUARY 25, 1988

Affirmed on Appeal

No. 87-927. RICHARDSON ET AL. *v.* EDWARDS, GOVERNOR OF LOUISIANA, ET AL. Affirmed on appeal from D. C. M. D. La.

Appeals Dismissed

No. 87-661. NORTHWOOD NURSING & CONVALESCENT HOME, INC. *v.* CITY OF PHILADELPHIA BOARD OF REVISION OF TAXES.

Appeal from Pa. Commw. Ct. Motion of appellee for damages denied. Appeal dismissed for want of properly presented federal question. Reported below: 98 Pa. Commw. 401, 511 A. 2d 281.

No. 87–871. HUNTER *v.* MURRAY, JUDGE, COURT OF CLAIMS, ALBANY, NEW YORK, ET AL. Appeal from App. Div., Sup. Ct. N. Y., 3d Jud. Dept., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 130 App. Div. 2d 836, 515 N. Y. S. 2d 160.

No. 87–5919. MARCH *v.* MARCH. Appeal from Dist. Ct. App. Fla., 2d Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 503 So. 2d 334.

No. 87–5926. LEMONS *v.* DRISKILL, ASSISTANT WARDEN, ET AL. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 831 F. 2d 1059.

No. 87–5974. ROBERTSON *v.* JONES, AKA ROBERTSON. Appeal from Sup. Ct. Del. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 530 A. 2d 1128.

No. 87–904. AMERICANA CORP. *v.* STATE HIGHWAY AND TRANSPORTATION COMMISSIONER OF VIRGINIA. Appeal from Sup. Ct. Va. dismissed for want of properly presented federal question.

No. 87–5659. TISCHIO *v.* NEW JERSEY. Appeal from Sup. Ct. N. J. dismissed for want of substantial federal question. Reported below: 107 N. J. 504, 527 A. 2d 388.

No. 87–5988. FLAKES *v.* WISCONSIN. Appeal from Ct. App. Wis. dismissed for want of substantial federal question. Reported below: 140 Wis. 2d 411, 410 N. W. 2d 614.

Miscellaneous Orders

No. A–441. FAZZINI *v.* UNITED STATES. Application for bail, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A–491. GEORGETOWN UNIVERSITY ET AL. *v.* GAY RIGHTS COALITION OF GEORGETOWN UNIVERSITY LAW CENTER ET AL., *ante*, p. 999. Motion for further consideration of application for stay denied. JUSTICE SCALIA took no part in the consideration or decision of this application.

No. A–561 (87–343). MONTANA ET AL. *v.* CROW TRIBE OF INDIANS ET AL., *ante*, p. 997. Application of appellees to issue the judgment forthwith, presented to JUSTICE O'CONNOR, and by her referred to the Court, granted.

No. A–562 (87–6173). DARDEN *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

No. D–644. IN RE DISBARMENT OF JAFREE. Disbarment entered. [For earlier order herein, see 483 U. S. 1017.]

No. D–654. IN RE DISBARMENT OF MILLER. Disbarment entered. [For earlier order herein, see 483 U. S. 1052.]

No. D–655. IN RE DISBARMENT OF WOOD. Disbarment entered. [For earlier order herein, see *ante*, p. 893.]

No. D–659. IN RE DISBARMENT OF SHIRLEY. Disbarment entered. [For earlier order herein, see *ante*, p. 920.]

No. D–663. IN RE DISBARMENT OF CIARDELLI. Disbarment entered. [For earlier order herein, see *ante*, p. 961.]

No. D–668. IN RE DISBARMENT OF RUBINO. It is ordered that John J. Rubino, of Levittown, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–669. IN RE DISBARMENT OF WADE. It is ordered that Hugh Mettye Wade, of Washington, D. C., be suspended from the practice of law in this Court and that a rule issue, returnable

within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–670. IN RE DISBARMENT OF LEWIS. It is ordered that Terrence Lee Lewis, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–671. IN RE DISBARMENT OF CLINTON. It is ordered that Daniel James Clinton, of Los Angeles, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–672. IN RE DISBARMENT OF COOPER. It is ordered that Edward Samuel Cooper, of Los Angeles, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–673. IN RE DISBARMENT OF SIMON. It is ordered that Nathan Simon, of Willoughby, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–674. IN RE DISBARMENT OF DOZORYST. It is ordered that Nicholas George Dozoryst II, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 108, Orig. NEBRASKA *v.* WYOMING ET AL. Defendants are invited to file responses within 21 days to the motion of plaintiff to amend petition for an order enforcing decree and for injunctive relief. [For earlier order herein, see, *e. g.*, 483 U. S. 1002.]

No. 87–253. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* KENDRICK ET AL. D. C. D. C. [Probable jurisdiction noted, *ante*, p. 942];

No. 87–431. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* KENDRICK ET AL. D. C. D. C. [Probable jurisdiction noted, *ante*, p. 942];

No. 87-462. KENDRICK ET AL. *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. D. C. D. C. [Probable jurisdiction noted, *ante*, p. 942]; and

No. 87-775. UNITED FAMILIES OF AMERICA *v.* KENDRICK ET AL. D. C. D. C. [Probable jurisdiction noted, *ante*, p. 1002.] Motion of the Solicitor General for divided argument granted.

No. 87-922. IN RE BROWN. Petition for writ of mandamus denied.

No. 87-5932. IN RE MARKEE. Petition for writ of prohibition denied.

No. 87-1005. IN RE ARLT ET UX. Motion of petitioners for a free white male Christian bench denied. Petition for writ of prohibition denied.

Certiorari Denied. (See also Nos. 87-871, 87-5919, 87-5926, and 87-5974, *supra*.)

No. 86-1065. O'SULLIVAN ET AL. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 798 F. 2d 969.

No. 87-31. FORD MOTOR CREDIT CO. *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON (JOHN STRIBLING FORD, INC., REAL PARTY IN INTEREST). C. A. 9th Cir. Certiorari denied.

No. 87-560. FMC WYOMING CORP. *v.* HODEL, SECRETARY OF THE INTERIOR, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 816 F. 2d 496.

No. 87-606. HUTCHINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 818 F. 2d 322.

No. 87-642. LEE ET AL. *v.* EKLUTNA, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 809 F. 2d 1406.

No. 87-670. GILARDY, SPECIAL ADMINISTRATOR OF THE ESTATE OF THOMPSON, ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 821 F. 2d 1427.

No. 87-676. MILLER & CO. *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 824 F. 2d 961.

No. 87-703. VAN CAUWENBERGHE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 827 F. 2d 424.

No. 87-716. KULLE *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. Reported below: 825 F. 2d 1188.

No. 87-748. GRASTY ET AL. *v.* AMALGAMATED CLOTHING & TEXTILE WORKERS UNION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 828 F. 2d 123.

No. 87-801. ROBINSON *v.* MONTGOMERY WARD & CO., INC. C. A. 4th Cir. Certiorari denied. Reported below: 823 F. 2d 793.

No. 87-847. TALBOT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 825 F. 2d 991.

No. 87-864. CITY OF WOODVILLE, MISSISSIPPI, ET AL. *v.* MONROE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 819 F. 2d 507.

No. 87-878. SCHATTNER, DBA SPORICIDIN CO. *v.* UNIDISCO, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 824 F. 2d 965.

No. 87-897. J. E. BERNARD & CO. *v.* INGERSOLL MILLING MACHINE CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 829 F. 2d 293.

No. 87-898. SURVIVAL SYSTEMS DIVISION OF THE WHITTAKER CORP. ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA (RODRIGUEZ, REAL PARTY IN INTEREST). C. A. 9th Cir. Certiorari denied. Reported below: 825 F. 2d 1416.

No. 87-901. GHANDHI ET AL. *v.* FAYED ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 823 F. 2d 959.

No. 87-909. CHULA VISTA CITY SCHOOL DISTRICT ET AL. *v.* BENNETT, SECRETARY OF EDUCATION. C. A. Fed. Cir. Certiorari denied. Reported below: 824 F. 2d 1573.

No. 87-910. GREAT LAKES DREDGE & DOCK CO., INC. *v.* FURKA, ADMINISTRATRIX OF THE ESTATE OF FURKA. C. A. 4th Cir. Certiorari denied. Reported below: 824 F. 2d 330.

No. 87-912. KINZLI ET AL. *v.* CITY OF SANTA CRUZ. C. A. 9th Cir. Certiorari denied. Reported below: 818 F. 2d 1449 and 830 F. 2d 968.

No. 87-914. ZERNICEK *v.* PETROLEOS MEXICANOS. C. A. 5th Cir. Certiorari denied. Reported below: 826 F. 2d 415.

No. 87-926. PAGE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 823 F. 2d 1263.

No. 87-931. PROUD *v.* GREYCAS, INC. C. A. 7th Cir. Certiorari denied. Reported below: 826 F. 2d 1560.

No. 87-934. DESHIELDS *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. Fed. Cir. Certiorari denied. Reported below: 833 F. 2d 1022.

No. 87-935. ALABAMA *v.* FORTIER. Ct. Crim. App. Ala. Certiorari denied. Reported below: 515 So. 2d 101.

No. 87-936. WITTEMAN *v.* JACK BARRY CABLE TV. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 192 Cal. App. 3d 1619, 228 Cal. Rptr. 584.

No. 87-939. DORNER ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 826 F. 2d 10.

No. 87-955. PICKNEY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 87-973. NATION *v.* GEORGIA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 822 F. 2d 64.

No. 87-974. PARLOR FURNITURE OF HICKORY, INC. *v.* MILLER. Ct. App. N. C. Certiorari denied. Reported below: 85 N. C. App. 538, 355 S. E. 2d 858.

No. 87-989. XANADU OF COCOA BEACH, INC. *v.* ZETLEY. C. A. 11th Cir. Certiorari denied. Reported below: 822 F. 2d 982.

No. 87-995. SHILLING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 826 F. 2d 1365.

No. 87-1004. BROBST ET AL. *v.* COLUMBUS SERVICES INTERNATIONAL. C. A. 3d Cir. Certiorari denied. Reported below: 824 F. 2d 271.

No. 87–1006. FULTON *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 742 P. 2d 1208.

No. 87–1007. PICOZZI *v.* SANDALOW. C. A. 6th Cir. Certiorari denied. Reported below: 827 F. 2d 770.

No. 87–1030. KOVIC *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 830 F. 2d 680.

No. 87–1033. GODOY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 821 F. 2d 1498.

No. 87–5408. TEAGUE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 87–5512. BAKER *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 513 So. 2d 1060.

No. 87–5754. AUSTIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 823 F. 2d 257.

No. 87–5767. DICICCO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 829 F. 2d 33.

No. 87–5871. ROBINSON *v.* FEDERAL ELECTION COMMISSION. C. A. Fed. Cir. Certiorari denied. Reported below: 831 F. 2d 305.

No. 87–5916. MAPSON *v.* PERINI. C. A. 6th Cir. Certiorari denied. Reported below: 827 F. 2d 770.

No. 87–5930. MURPHY ET AL. *v.* MESCHER. C. A. 8th Cir. Certiorari denied.

No. 87–5931. SPAN *v.* MORSE. C. A. 11th Cir. Certiorari denied.

No. 87–5933. PETWAY *v.* KINCAID ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 828 F. 2d 17.

No. 87–5936. SPARKMAN *v.* TEXAS. Ct. App. Tex., 11th Dist. Certiorari denied.

No. 87–5938. MARLOW *v.* UNITED STATES DEPARTMENT OF EDUCATION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 820 F. 2d 581.

No. 87–5951. FREEDMAN *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 25 M. J. 219.

No. 87–5953. JOHNSON *v.* OKLAHOMA. C. A. 10th Cir. Certiorari denied.

No. 87–5965. JAMES *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 118 Ill. 2d 214, 514 N. E. 2d 998.

No. 87–5967. THOMPSON *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 153 Ill. App. 3d 1163, 517 N. E. 2d 353.

No. 87–5969. SCHELL *v.* MEESE, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 826 F. 2d 1065.

No. 87–5970. MARTIN *v.* DUTCH FORK MAGISTRATE. Ct. Common Pleas of Richland County, S. C. Certiorari denied.

No. 87–5978. HEADLEY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 87–5981. MCCHRISTION *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 828 F. 2d 399.

No. 87–5995. GUERRERO *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 87–6000. BOYER *v.* DAUM. C. A. 8th Cir. Certiorari denied. Reported below: 831 F. 2d 301.

No. 87–6003. EDWARDS *v.* LAMBDIN. C. A. 11th Cir. Certiorari denied. Reported below: 827 F. 2d 774.

No. 87–6004. LEMONS *v.* DRETKE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 833 F. 2d 1007.

No. 87–6005. LEMONS *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 832 F. 2d 1263.

No. 87–6007. RADVAN-ZIEMNOWICZ *v.* ZIEMNOWICZ ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 826 F. 2d 1060.

No. 87–6012. MURPHY *v.* NEISNER; and POOL *v.* BURLISON. Sup. Ct. Mo. Certiorari denied.

No. 87–6016. TAYLOR *v.* HENRY VOGT MACHINE CO. C. A. 6th Cir. Certiorari denied. Reported below: 825 F. 2d 412.

No. 87–6018. SOLOMON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 825 F. 2d 1292.

No. 87–6024. MILHEM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 834 F. 2d 118.

No. 87–6025. BUSTAMANTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 2d 303.

No. 87–6035. ADAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 834 F. 2d 632.

No. 87–6039. BRAMBLETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 825 F. 2d 412.

No. 87–6046. JONES *v.* SOWDERS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 833 F. 2d 1012.

No. 87–6049. FRIEND *v.* KENTUCKY. C. A. 6th Cir. Certiorari denied. Reported below: 827 F. 2d 769.

No. 87–6056. WHITE *v.* DEPARTMENT OF JUSTICE. C. A. Fed. Cir. Certiorari denied. Reported below: 829 F. 2d 43.

No. 87–6104. ACHARYA *v.* BJORKSTEN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 828 F. 2d 21.

No. 87–6109. TUFFORD *v.* ALASKA. Ct. App. Alaska. Certiorari denied.

No. 87–523. CARLIN *v.* MCKEAN, INDIVIDUALLY AND AS A MEMBER OF BOARD OF GOVERNORS OF THE UNITED STATES POSTAL SERVICE, ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 262 U. S. App. D. C. 212, 823 F. 2d 620.

No. 87–698. MCMANUS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 826 F. 2d 1061.

No. 87–844. CONNECTICUT *v.* MEBANE. Sup. Ct. Conn. Motion of respondent for leave to proceed *in forma pauperis* granted.

Certiorari denied. Reported below: 204 Conn. 585, 529 A. 2d 680.

No. 87-900. REICHHOLD CHEMICALS, INC. *v.* CASSINO ET AL. C. A. 9th Cir. Motion of Equal Employment Advisory Council for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 817 F. 2d 1338.

No. 87-5699. JONES *v.* BUTLER, WARDEN. Sup. Ct. La.;

No. 87-5821. JESTER *v.* OHIO. Sup. Ct. Ohio;

No. 87-5968. MORALES *v.* OHIO. Sup. Ct. Ohio;

No. 87-5973. SCHNEIDER *v.* MISSOURI. Sup. Ct. Mo.; and

No. 87-5985. ZUERN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: No. 87-5699, 512 So. 2d 427; No. 87-5821, 32 Ohio St. 3d 147, 512 N. E. 2d 962; No. 87-5968, 32 Ohio St. 3d 252, 513 N. E. 2d 267; No. 87-5973, 736 S. W. 2d 392; No. 87-5985, 32 Ohio St. 3d 56, 512 N. E. 2d 585.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 87-5764. DENNIS *v.* UNITED STATES ATTORNEY GENERAL ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari.

Rehearing Denied

No. 86-327. MULLINS COAL CO., INC. OF VIRGINIA, ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL., *ante*, p. 135;

No. 87-579. KATZ *v.* NEW YORK, *ante*, p. 960;

No. 87-5105. HARPER, A MINOR, BY HER MOTHER AND NEXT FRIEND, HARPER *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, *ante*, p. 969;

No. 87-5482. CHILDS *v.* GEORGIA, *ante*, p. 970;

No. 87-5573. BURY *v.* CITY OF LAKELAND, FLORIDA, ET AL., *ante*, p. 966;

No. 87-5640. MCGLORY *v.* YOKA ET AL., *ante*, p. 968;

No. 87-5718. MINER *v.* UNITED STATES, *ante*, p. 969; and

No. 87-5789. IN RE SAFIR, *ante*, p. 975. Petitions for rehearing denied.

No. 84-5929. BALICH *v.* STANLEY, 469 U. S. 1222. Motion for leave to file petition for rehearing denied.

No. 86-6384. ROMINE *v.* GEORGIA, 481 U. S. 1024. Petition for rehearing denied.

JUSTICE MARSHALL, dissenting.

I

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231-241 (1976) (MARSHALL, J., dissenting), I would vacate the decision below insofar as it left undisturbed the death sentence imposed in this case.

II

Even if I did not hold this view, I would vacate petitioner's sentence of death for reconsideration in light of this Court's recent decision in *Lowenfield* v. *Phelps*, *ante*, p. 231. The Court in *Lowenfield* rejected a claim, similar to the one advanced by petitioner in this case, that the administration of an *Allen* charge to a capital sentencing jury was coercive. The Court recognized, however, that such a charge must be considered "'in its context and under all the circumstances.'" *Ante*, at 237 (quoting *Jenkins* v. *United States*, 380 U. S. 445, 446 (1965) *(per curiam)*). Moreover, the Court explicitly limited its holding to the facts of the case before it, stating that "we do not mean to be understood as saying other combinations of supplemental charges and polling might not require a different conclusion." *Ante*, at 241. The circumstances surrounding the administration of the *Allen* charge in the instant case differed substantially from those in *Lowenfield*. Moreover, they did so in ways that the Court in *Lowenfield* recognized as relevant to the issue of coercion. The Georgia Supreme Court therefore should be given an opportunity to reevaluate petitioner's sentence in light of this Court's decision in *Lowenfield*.

Petitioner Larry Romine was convicted of capital murder and sentenced to death. His death sentence was reversed on appeal by the Georgia Supreme Court, and the case was remanded for a new sentencing trial. 251 Ga. 208 (1983). On retrial, after almost seven hours of deliberations and an overnight recess, the foreman of the jury sent the court a note that read: "We are unable to reach a unanimous decision and are certain we will not

ever be able to reach one." App. A to Pet. for Cert. 3. The court called the jury in and inquired: "[C]an you just give me the numerical breakdown of how you stand?" *Ibid.* The foreman replied that the jury was divided 11 to 1. The court sent the jury back for further deliberations, over the objection of defense counsel. When the jury still had not reached a verdict 5½ hours later, the court called the jury in again to give it "some other instructions." *Id.*, at 4. The court then administered an *Allen* charge, urging the jurors to reexamine the grounds of their opinions and attempt to reach a verdict. Two hours later, the jury returned a unanimous verdict of death.

In Georgia, as in Lowenfield's State of Louisiana, a hung jury in a capital sentencing trial results in the automatic imposition of a life sentence. See Ga. Code Ann. § 17–10–31 (1982); *Hill* v. *State*, 250 Ga. 821, 301 S. E. 2d 269 (1983); *Miller* v. *State*, 237 Ga. 557, 229 S. E. 2d 376 (1976). Thus, the State's usual interest in an *Allen* charge—avoiding the societal costs of a retrial—is not present. The Court in *Lowenfield* recognized that this difference "weighs in the constitutional calculus." *Ante*, at 238. The Court nonetheless concluded that the circumstances surrounding the administration of the charge in Lowenfield's case did not warrant a reversal on the ground of jury coercion. The discussion in *Lowenfield*, however, indicates that the circumstances relevant to petitioner's claim may produce a different result in the "constitutional calculus."

First, the jury polling that preceded the *Allen* charge in this case was far more coercive than the polling tolerated in *Lowenfield*. The Court in *Lowenfield* took great pains to establish that "the inquiry as to the numerical division of the jury was not as to how they stood on the merits of the verdict, but how they stood on the question whether further deliberations might assist them in returning a verdict." *Ante*, at 240. Here, the court's question undoubtedly was directed at the jury's division on the merits, placing it squarely within this Court's holding in *Brasfield* v. *United States*, 272 U. S. 448 (1926), which the *Lowenfield* Court held to be "instructive as to the potential dangers of jury polling." *Ante*, at 240.

Second, the jury's expression of its deadlock was much more unequivocal in this case than in *Lowenfield*. In *Lowenfield*, the jury's note to the court stated that it was unable to reach a verdict *at that time*. *Ante*, at 234. In the instant case, the jury not only stated that it was unable to reach a unanimous decision, but speci-

fied that "[w]e . . . are *certain* we will not *ever* be able to reach one." App. A to Pet. for Cert. 3 (emphasis added). After such an emphatic statement of deadlock, followed by 5½ hours of further unsuccessful deliberations, the jury may well have inferred from an *Allen* charge that the court was absolutely set on unanimity and unwilling to settle for anything less.

Third, the jury in this case did not request to be reinstructed, as did the jury in *Lowenfield*. Moreover, whereas the court in *Lowenfield* merely reiterated the part of its original jury instructions dealing with the jury's duty to deliberate with an open mind, the court's supplemental charge in this case was by its own admission different from the instructions given at the commencement of deliberations. The fact that the court summoned the jury on its own accord to deliver new and unfamiliar instructions heightened the coerciveness of the verdict-urging charge. See, *e. g.*, *United States* v. *Seawell*, 550 F. 2d 1159, 1163 (CA9 1977) (*Allen* charge should not be given during deliberations unless jury requests it); *United States* v. *Blandin*, 784 F. 2d 1048, 1050 (CA10 1986) (*Allen* charge should be given during the court's original jury instructions rather than during the course of deliberations).

Finally, the polling in this case revealed a division of 11 to 1, and the trial judge knew of this division when he decided to give the *Allen* charge 5½ hours later. Furthermore, it was clear to the lone dissenting juror that the judge knew that there was only one holdout when he decided to give the charge. In *Lowenfield*, by contrast, the jury itself had requested the charge, so the single juror identified by the second poll could not have speculated that the results of the poll motivated the judge to give the charge. The dissenting juror in each case may have interpreted the charge as being directed at him or her alone. But the administration of the charge in the instant case would have communicated to the dissenter the judge's exasperation with her failure to capitulate.

I was convinced by the circumstances surrounding the *Allen* charge in *Lowenfield* that coercion of the jury had indeed occurred. But the circumstances of the instant case are significantly more coercive than those I condemned in *Lowenfield*. The majority opinion in *Lowenfield* promised that future cases would be considered on their particular facts and that the *Lowenfield* decision did not give *carte blanche* to state trial courts to use polling procedures and *Allen* charges indiscriminately during capi-

tal sentencing proceedings. That promise requires that the Georgia Supreme Court be given an opportunity to reconsider the circumstances surrounding the *Allen* charge in this case in light of this Court's discussion of jury coercion in *Lowenfield*. I dissent.

FEBRUARY 4, 1988

Miscellaneous Order

No. A–541 (87–6196). GARDNER *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Forsyth County, N. C. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

FEBRUARY 5, 1988

Miscellaneous Order

No. A–599 (87–6360). CLARK *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court. JUSTICE WHITE would deny the application. JUSTICE SCALIA took no part in the consideration or decision of this application.

FEBRUARY 10, 1988

Miscellaneous Order

No. A–616 (87–6406). WILLIAMS *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Applica-

tion for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court. JUSTICE WHITE took no part in the consideration or decision of this application.

FEBRUARY 18, 1988

Miscellaneous Order. (For Court's order making allotment of Justices, see *ante*, p. VII.)

FEBRUARY 19, 1988

Dismissal Under Rule 53

No. 87–858. VARANDANI *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 824 F. 2d 307.

FEBRUARY 22, 1988

Appeals Dismissed

No. 87–820. KELLAM ET AL. *v.* PFEIFER ET AL. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of properly presented federal question.

No. 87–918. SMITH *v.* FLORIDA DEPARTMENT OF BUSINESS REGULATION, DIVISION OF LAND SALES, CONDOMINIUMS AND MOBILE HOMES. Appeal from Dist. Ct. App. Fla., 1st Dist., dismissed for want of substantial federal question. Reported below: 504 So. 2d 1285.

No. 87–1016. STORY *v.* CALIFORNIA. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question.

No. 87–1027. RESTER *v.* TEXAS. Appeal from Ct. App. Tex., 14th Dist., dismissed for want of substantial federal question.

No. 87–1035. JOYCE *v.* LEWIS BOLT & NUT CO. ET AL. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. Reported below: 412 N. W. 2d 304.

No. 87–1060. LOGEMANN, INDIVIDUALLY AND AS TRUSTEE OF THE MCCARTY RANCH TRUST *v.* CRAIG, TRUSTEE OF CASSIDY LAND & CATTLE CO., INC., ET AL. Appeal from Sup. Ct. Neb. dismissed for want of substantial federal question. Reported below: 226 Neb. 587, 412 N. W. 2d 857.

No. 87–1081. GRAND FORKS-TRAILL WATER USERS, INC. *v.* HJELLE, NORTH DAKOTA STATE HIGHWAY COMMISSIONER. Appeal from Sup. Ct. N. D. dismissed for want of substantial federal question. Reported below: 413 N. W. 2d 344.

No. 87–6064. SEABORNE *v.* COUNTY COMMISSIONERS OF WASHINGTON COUNTY. Appeal from Sup. Jud. Ct. Me. dismissed for want of substantial federal question. Reported below: 514 A. 2d 1203.

No. 87–946. CITY OF PALO ALTO ET AL. *v.* CENTURY FEDERAL, INC., ET AL. Appeal from D. C. N. D. Cal. dismissed for want of jurisdiction. Reported below: 710 F. Supp. 1552.

No. 87–1003. SCHAEFER *v.* STATE ADMINISTRATIVE BOARD OF ELECTION LAWS. Appeal from Ct. Sp. App. Md. dismissed for want of jurisdiction. Reported below: 71 Md. App. 740.

No. 87–1071. LIGGETT ET UX. *v.* STATE FARM FIRE & CASUALTY CO. Appeal from C. A. 10th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 87–1096. WRIGHT ET AL. *v.* WELCH ET AL. Appeal from App. Ct. Mass. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 24 Mass. App. 409, 509 N. E. 2d 923.

No. 87–1123. CHRISTIAN ET AL. *v.* BEWKES. Appeal from Sup. Jud. Ct. Mass. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 400 Mass. 753, 511 N. E. 2d 587.

No. 87–1162. CLISSURAS *v.* CITY OF NEW YORK ET AL. Appeal from App. Div., Sup. Ct. N. Y., 2d Jud. Dept., dismissed for want of jurisdiction. Treating the papers whereon the appeal

was taken as a petition for writ of certiorari, certiorari denied. Reported below: 131 App. Div. 2d 717, 517 N. Y. S. 2d 39.

No. 87–5419. KOSS *v.* SLATER, JUDGE. Appeal from Sup. Ct. Ill. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 116 Ill. 2d 389, 507 N. E. 2d 826.

No. 87–6095. MARTINEZ *v.* COLORADO. Appeal from Sup. Ct. Colo. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 739 P. 2d 838.

Certiorari Granted—Vacated and Remanded

No. 87–544. COOMBE, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY *v.* ESCALERA. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Taylor* v. *Illinois*, *ante*, p. 400. Reported below: 826 F. 2d 185.

No. 87–5836. BIDDLE *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position presently asserted by the Solicitor General in his brief filed January 11, 1988. Reported below: 822 F. 2d 56.

Miscellaneous Orders

No. 86–492. BOYLE, PERSONAL REPRESENTATIVE OF THE HEIRS AND ESTATE OF BOYLE *v.* UNITED TECHNOLOGIES CORP. C. A. 4th Cir. [Certiorari granted, 479 U. S. 1029]; and

No. 86–5309. ROSS *v.* OKLAHOMA. Ct. Crim. App. Okla. [Certiorari granted, 482 U. S. 926.] Cases restored to calendar for reargument.

No. 86–684. CALIFORNIA *v.* GREENWOOD ET AL. Ct. App. Cal., 4th App. Dist. [Certiorari granted, 483 U. S. 1019.] Motion of respondent Billy Greenwood for leave to file a supplemental brief after argument granted. JUSTICE KENNEDY took no part in the consideration or decision of this motion.

No. 86–803. BOOS ET AL. *v.* BARRY, MAYOR OF THE DISTRICT OF COLUMBIA, ET AL. C. A. D. C. Cir. [Certiorari granted, 479

U. S. 1083.] Motion of respondents for leave to file a supplemental brief after argument granted. JUSTICE KENNEDY took no part in the consideration or decision of this motion.

No. 86-1836. NEW YORK STATE CLUB ASSN., INC. *v.* CITY OF NEW YORK ET AL. Ct. App. N. Y. [Probable jurisdiction noted, *ante*, p. 812.] Motion of NOW Legal Defense and Education Fund et al. for leave to file a brief as *amici curiae* granted.

No. 86-2000. UNITED STATES *v.* KOZMINSKI ET AL. C. A. 6th Cir. [Certiorari granted, *ante*, p. 894.] Motion of International Society for Krishna Consciousness of California, Inc., for leave to file a brief as *amicus curiae* granted.

No. 86-2037. LANDERS *v.* NATIONAL RAILROAD PASSENGER CORPORATION ET AL. C. A. 1st Cir. [Certiorari granted, *ante*, p. 962.] Motion of respondents for divided argument denied.

No. 86-7059. PATTERSON *v.* ILLINOIS. Sup. Ct. Ill. [Certiorari granted, *ante*, p. 895.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 87-354. ARIZONA *v.* ROBERSON. Ct. App. Ariz. [Certiorari granted, *ante*, p. 975.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 87-82. FEDERAL DEPOSIT INSURANCE CORPORATION *v.* MALLEN ET AL. D. C. N. D. Iowa. [Probable jurisdiction noted, *ante*, p. 911.] Motion for appointment of counsel granted, and it is ordered that Mary E. Curtin, Esq., of Minneapolis, Minn., be appointed to serve as counsel for appellee James Mallen in this case.

No. 87-328. RILEY, DISTRICT ATTORNEY OF THE TENTH PROSECUTORIAL DISTRICT OF NORTH CAROLINA, ET AL. *v.* NATIONAL FEDERATION OF THE BLIND OF NORTH CAROLINA, INC., ET AL. C. A. 4th Cir. [Probable jurisdiction noted, *ante*, p. 911.] Motion of Independent Sector et al. for leave to file an out-of-time motion to participate in oral argument as *amici curiae* and for divided argument denied.

No. 87-339. CITY OF NEW YORK ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. [Certiorari

granted, *ante*, p. 962.] Motion of the Solicitor General for divided argument granted.

No. 87–416. UNITED STATES CATHOLIC CONFERENCE ET AL. *v.* ABORTION RIGHTS MOBILIZATION, INC., ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 975.] Motion of the Solicitor General for divided argument granted.

No. 87–352. SUN OIL CO. *v.* WORTMAN ET AL. Sup. Ct. Kan. [Certiorari granted, *ante*, p. 912.] Motions of GAF Corp. and Wiley Goad for leave to file briefs as *amici curiae* granted.

No. 87–363. FEDERAL ENERGY REGULATORY COMMISSION *v.* MARTIN EXPLORATION MANAGEMENT CO. ET AL.; and

No. 87–364. PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK ET AL. *v.* MARTIN EXPLORATION MANAGEMENT CO. ET AL. C. A. 10th Cir. [Certiorari granted, *ante*, p. 962.] Motions of Interstate Natural Gas Association of America and Williams Natural Gas Co. for leave to file briefs as *amici curiae* granted. Motion of the Solicitor General for divided argument granted. JUSTICE WHITE took no part in the consideration or decision of these motions.

No. 87–519. MAYNARD, WARDEN, ET AL. *v.* CARTWRIGHT. C. A. 10th Cir. [Certiorari granted, *ante*, p. 1003.] Motion for appointment of counsel granted, and it is ordered that Mandy Welch, Esq., of Norman, Okla., be appointed to serve as counsel for respondent in this case.

No. 87–654. NEW ENERGY COMPANY OF INDIANA *v.* LIMBACH, TAX COMMISSIONER OF OHIO, ET AL. Sup. Ct. Ohio. [Probable jurisdiction noted, *ante*, p. 984.] Motion of appellees for divided argument denied.

No. 87–883. HONDA MOTOR CO., LTD., ET AL. *v.* CAMACHO ET UX. Sup. Ct. Colo. Motion of respondents for damages denied.

No. 87–1020. DAVIS *v.* MICHIGAN DEPARTMENT OF THE TREASURY. Appeal from Ct. App. Mich. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 87–1047. NATIONWIDE CORP. ET AL. *v.* HOWING CO. ET AL. C. A. 6th Cir. The Solicitor General is invited to file a brief

in this case expressing the views of the United States. JUSTICE WHITE took no part in the consideration or decision of this order.

No. 87-5428. HOUSTON *v.* LACK, WARDEN. C. A. 6th Cir. [Certiorari granted, *ante*, p. 1025.] Motion for appointment of counsel granted, and it is ordered that Penny J. White, Esq., of Johnson City, Tenn., be appointed to serve as counsel for petitioner in this case.

No. 87-5461. HENSON *v.* EAST LINCOLN TOWNSHIP ET AL. C. A. 7th Cir. [Certiorari granted, *ante*, p. 923.] Motion of the parties to defer further proceedings granted.

No. 87-5954. LANGSTER *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. Fed. Cir.;

No. 87-6067. FLAHERTY *v.* UNITED STATES. C. A. 11th Cir.; and

No. 87-6219. PEREZ ET UX. *v.* UNITED STATES. C. A. 11th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until March 14, 1988, within which to pay the docketing fee required by Rule 45(a) and to submit petitions for writs of certiorari in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petitions for writs of certiorari without reaching the merits of the motions to proceed *in forma pauperis*.

No. 87-1251. IN RE SOWELL. Petition for writ of habeas corpus denied.

No. 87-6059. IN RE PRATHER. Petition for writ of mandamus denied.

No. 87-1050. IN RE GOLDSTEIN. Petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 87-826. GOLDBERG ET AL. *v.* SWEET, DIRECTOR, ILLINOIS DEPARTMENT OF REVENUE, ET AL.; and

No. 87-1101. GTE SPRINT COMMUNICATIONS CORP. *v.* SWEET, DIRECTOR, ILLINOIS DEPARTMENT OF REVENUE, ET AL. Appeals from Sup. Ct. Ill. Probable jurisdiction noted, cases

consolidated, and a total of one hour allotted for oral argument. Reported below: 117 Ill. 2d 493, 512 N. E. 2d 1262.

No. 87–984. SHELL OIL CO. *v.* IOWA DEPARTMENT OF REVENUE. Appeal from Sup. Ct. Iowa. Probable jurisdiction noted. Reported below: 414 N. W. 2d 113.

No. 87–998. CITY OF RICHMOND *v.* J. A. CROSON CO. Appeal from C. A. 4th Cir. Motion of National League of Cities et al. for leave to file a brief as *amici curiae* granted. Probable jurisdiction noted. Reported below: 822 F. 2d 1355.

No. 87–1279 (A–606). MORRISON, INDEPENDENT COUNSEL *v.* OLSON ET AL. Appeal from C. A. D. C. Cir. Probable jurisdiction noted. Motion of Lawrence Walsh, Independent Counsel, for leave to file a brief as *amicus curiae* granted. Motions to establish an expedited schedule for briefing and oral argument granted. Appellant's brief shall be filed by 3 p.m., March 9, 1988. Appellees' briefs shall be filed by 3 p.m., April 8, 1988. Reply briefs, if any, shall be filed by 3 p.m., April 18, 1988. Oral argument is set for April 26, 1988, at 10 a.m. Motion to dispense temporarily with printing briefs denied. Motions for additional time for oral argument denied without prejudice. Application for full stay of mandate of the United States Court of Appeals for the District of Columbia Circuit, presented to THE CHIEF JUSTICE, and by him referred to the Court, is granted pending the sending down of the judgment of this Court. JUSTICE KENNEDY took no part in the consideration or decision of these motions and orders. Reported below: 267 U. S. App. D. C. 178, 838 F. 2d 476.

Certiorari Granted

No. 87–764. FLORIDA *v.* RILEY. Sup. Ct. Fla. Certiorari granted. Reported below: 511 So. 2d 282.

No. 87–821. PITTSTON COAL GROUP ET AL. *v.* SEBBEN ET AL.; and

No. 87–827. MCLAUGHLIN, SECRETARY OF LABOR, ET AL. *v.* SEBBEN ET AL. C. A. 8th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 815 F. 2d 475.

No. 87–1061. NATIONAL COLLEGIATE ATHLETIC ASSN. *v.* TARKANIAN. Sup. Ct. Nev. Certiorari granted limited to Ques-

tion 1 presented by the petition. Reported below: 103 Nev. 331, 741 P. 2d 1345.

No. 87–6116. PENSON *v.* OHIO. Ct. App. Ohio, Montgomery County. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted.

Certiorari Denied. (See also Nos. 87–1071, 87–1096, 87–1123, 87–1162, 87–5419, and 87–6095, *supra.*)

No. 86–2052. BERRYHILL *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 87–522. SMITH *v.* TEXAS DEPARTMENT OF WATER RESOURCES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 818 F. 2d 363.

No. 87–537. DARNELL *v.* SWINNEY, WASHOE COUNTY SHERIFF, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 823 F. 2d 299.

No. 87–630. DOBROWOLSKYJ *v.* JEFFERSON COUNTY, KENTUCKY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 823 F. 2d 955.

No. 87–640. E. C. ERNST, INC., ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 262 U. S. App. D. C. 150, 822 F. 2d 1212.

No. 87–647. DAVIS *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 24 M. J. 222.

No. 87–649. CITY OF ANN ARBOR ET AL. *v.* CHRISTY. C. A. 6th Cir. Certiorari denied. Reported below: 824 F. 2d 489.

No. 87–727. GENERAL TELEPHONE COMPANY OF CALIFORNIA ET AL. *v.* ADDY. C. A. 9th Cir. Certiorari denied. Reported below: 814 F. 2d 1311.

No. 87–737. PIZZITOLO *v.* ELECTRO-COAL TRANSFER CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 812 F. 2d 977.

No. 87–741. DOWNS *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 87-745. FORD MOTOR CO. ET AL. *v.* TUNIS BROTHERS CO., INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 823 F. 2d 49.

No. 87-769. OLAQUES *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 817 F. 2d 1018.

No. 87-780. POLLAK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 87-803. HOUGHTON ET UX. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 829 F. 2d 33.

No. 87-810. FLOREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 830 F. 2d 1130.

No. 87-815. CORACE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 825 F. 2d 412.

No. 87-818. HAYES *v.* PRUDENTIAL INSURANCE COMPANY OF AMERICA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 819 F. 2d 921.

No. 87-819. SMITH *v.* INTERNATIONAL FUNDING CORP. ET AL. C. A. 9th Cir. Certiorari denied.

No. 87-825. TILLEY *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 25 M. J. 20.

No. 87-830. MCGREGOR, TRUSTEE IN BANKRUPTCY FOR THE ESTATE OF PARSONS STEEL INDUSTRIES, INC. *v.* FIRST ALABAMA BANK OF MONTGOMERY, N. A., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 825 F. 2d 1475.

No. 87-832. ARNOLD *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 25 M. J. 129.

No. 87-833. HAGEN *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 25 M. J. 78.

No. 87-837. CHERRY ET AL. *v.* COAST HOUSE LTD. ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 257 Ga. 403, 359 S. E. 2d 904.

No. 87-838. WILLIAMS *v.* HAWKINS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 825 F. 2d 409.

No. 87-840. CUMBERLAND FARMS, INC. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 826 F. 2d 1151.

No. 87-853. SIERRA PACIFIC POWER CO. *v.* PUBLIC SERVICE COMMISSION OF NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 103 Nev. 187, 734 P. 2d 1245.

No. 87-863. JENSEN *v.* SATRAN, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 87-865. GREGORY LUMBER CO., INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 831 F. 2d 305.

No. 87-868. NELSON *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 25 M. J. 110.

No. 87-870. CONNECTICUT *v.* JARZBEK. Sup. Ct. Conn. Certiorari denied. Reported below: 204 Conn. 683, 529 A. 2d 1245.

No. 87-877. JOVANOVIC *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 824 F. 2d 677.

No. 87-879. ODEGARD *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 25 M. J. 140.

No. 87-882. BARNES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 820 F. 2d 1229.

No. 87-884. BENSON *v.* ALLY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 828 F. 2d 771.

No. 87-885. KHAN *v.* JENKINS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 814 F. 2d 655.

No. 87-891. FRIEDRICH *v.* OHIO. Ct. App. Ohio, Holmes County. Certiorari denied.

No. 87-895. HEDLUND ET AL. *v.* MILLER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 813 F. 2d 1344.

No. 87-905. ANNABI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 824 F. 2d 1294.

No. 87-906. ROBERTS ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 829 F. 2d 1130.

No. 87-917. POST *v.* SUPERIOR COURT OF LOS ANGELES COUNTY ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 87-921. JOHN D. COPANOS & SONS, INC., ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 831 F. 2d 290.

No. 87-925. GALARDI *v.* STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 43 Cal. 3d 683, 739 P. 2d 134.

No. 87-928. METZ BAKING CO. ET AL. *v.* THOMAS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 826 F. 2d 755.

No. 87-933. MIMS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 152 Ill. App. 3d 1164, 515 N. E. 2d 1066.

No. 87-938. ARTHUR YOUNG & CO. *v.* BANK OF NEW ORLEANS & TRUST CO. C. A. 5th Cir. Certiorari denied. Reported below: 823 F. 2d 888.

No. 87-940. SINCLAIR *v.* MONTGOMERY COUNTY, ALABAMA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 829 F. 2d 1123.

No. 87-941. CITIBANK, N. A. *v.* DATA LEASE FINANCIAL CORP. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 828 F. 2d 686.

No. 87-944. JOHNSON ET AL. *v.* PACIFIC LIGHTING LAND CO. C. A. 9th Cir. Certiorari denied. Reported below: 817 F. 2d 601.

No. 87-945. TARALA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 153 Ill. App. 3d 199, 505 N. E. 2d 1284.

No. 87-948. HARRIS *v.* ATTORNEY GRIEVANCE COMMISSION OF MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 310 Md. 197, 528 A. 2d 895.

No. 87-952. VANDERWALL *v.* HORNER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 824 F. 2d 970.

No. 87–954. KANSAS CITY AREA TRANSPORTATION AUTHORITY *v.* 4550 MAIN ASSOCIATES ET AL. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 742 S. W. 2d 182.

No. 87–956. ALEXANDER *v.* UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT. C. A. D. C. Cir. Certiorari denied.

No. 87–962. SOUTHERN UNION CO. *v.* CONSOLIDATED OIL & GAS, INC. Sup. Ct. N. M. Certiorari denied. Reported below: 106 N. M. 719, 749 P. 2d 1098.

No. 87–965. CITY OF SAN ANTONIO *v.* ROSOW. Sup. Ct. Tex. Certiorari denied. Reported below: 734 S. W. 2d 659.

No. 87–968. SKORKO *v.* SKORKO. Sup. Ct. N. H. Certiorari denied.

No. 87–971. LOFTIN-BOGGS *v.* CITY OF MERIDIAN, MISSISSIPPI, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 824 F. 2d 971.

No. 87–983. SGRO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 816 F. 2d 30.

No. 87–987. ZAC SMITH & CO., INC. *v.* OTIS ELEVATOR CO. Sup. Ct. Tex. Certiorari denied. Reported below: 734 S. W. 2d 662.

No. 87–991. ALAMO RENT-A-CAR, INC. *v.* SARASOTA-MANATEE AIRPORT AUTHORITY. C. A. 11th Cir. Certiorari denied. Reported below: 825 F. 2d 367.

No. 87–1002. OKWUMABUA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 828 F. 2d 950.

No. 87–1008. HAYES *v.* ANSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 823 F. 2d 554.

No. 87–1009. SCHUBERT & SALZER MASCHINENFABRIK AKTIENGESELLSCHAFT ET AL. *v.* SPINDELFABRIK SUESSEN-SCHURR, STAHLECKER & GRILL GMBH. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 829 F. 2d 1075.

No. 87–1012. SANDERS *v.* RAGLAND, ARKANSAS COMMISSIONER OF REVENUES. C. A. 6th Cir. Certiorari denied. Reported below: 825 F. 2d 411.

No. 87–1019. FIELDS ET AL. *v.* ALLEN ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 257 Ga. XXVI, 359 S. E. 2d 918.

No. 87–1023. BERNSTEIN ET UX. *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 155 Ill. App. 3d 445, 508 N. E. 2d 277.

No. 87–1024. LANDON *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 48 Wash. App. 1042.

No. 87–1025. MORGAN *v.* OHIO. Ct. App. Ohio, Clark County. Certiorari denied.

No. 87–1029. MILLER INSITUFORM, INC., ET AL. *v.* INSITUFORM OF NORTH AMERICA, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 830 F. 2d 606.

No. 87–1034. MECHANISED CONSTRUCTION OF PAKISTAN LTD. *v.* AMERICAN CONSTRUCTION MACHINERY & EQUIPMENT LTD. C. A. 2d Cir. Certiorari denied. Reported below: 828 F. 2d 117.

No. 87–1036. NEW ENGLAND TEAMSTERS & TRUCKING INDUSTRY PENSION FUND *v.* GRAF. C. A. 1st Cir. Certiorari denied. Reported below: 828 F. 2d 877.

No. 87–1037. DEERE & CO. *v.* KENNEDY ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 118 Ill. 2d 69, 514 N. E. 2d 171.

No. 87–1041. POSCHWATTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 829 F. 2d 1477.

No. 87–1044. HILL *v.* FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 513 So. 2d 129.

No. 87–1046. RODRIGUES *v.* MARTIN MARIETTA CORP., MASTER BUILDERS DIVISION, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 829 F. 2d 39.

No. 87–1052. PATE *v.* WORKMEN'S COMPENSATION APPEAL BOARD OF PENNSYLVANIA (BOEING VERTOL CO.). Sup. Ct. Pa. Certiorari denied. Reported below: 517 Pa. 611, 536 A. 2d 1335.

No. 87–1056. PENDLETON *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 184 Ga. App. 358, 361 S. E. 2d 663.

No. 87–1057. COOPER INDUSTRIES, INC. *v.* JUNO LIGHTING, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 826 F. 2d 1073.

No. 87–1058. MORRISON *v.* GENUINE PARTS CO. C. A. 11th Cir. Certiorari denied. Reported below: 828 F. 2d 708.

No. 87–1059. DIORIO *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 12 Conn. App. 74, 529 A. 2d 1320.

No. 87–1063. WOLIN *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 819 F. 2d 1301.

No. 87–1066. SIERRA MARKETING CO. *v.* ROTATIONAL MOLDING, INC. C. A. 9th Cir. Certiorari denied. Reported below: 825 F. 2d 414.

No. 87–1067. HOWELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 835 F. 2d 1430.

No. 87–1072. RUSSO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 823 F. 2d 1553.

No. 87–1073. THOMPSON ET UX. *v.* HAMMOND ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 835 F. 2d 284.

No. 87–1075. SHAKMAN ET AL. *v.* DUNNE, PRESIDENT OF THE BOARD OF COMMISSIONERS OF COOK COUNTY, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 829 F. 2d 1387.

No. 87–1076. LAVAY CORP. ET AL. *v.* DOMINION FEDERAL SAVINGS & LOAN ASSN. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 830 F. 2d 522.

No. 87–1078. SCHMIDT *v.* PRESIDENT OF THE UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 826 F. 2d 1065.

No. 87–1082. TARRANT COUNTY HOSPITAL DISTRICT *v.* HUGHES, JUDGE, ET AL. Sup. Ct. Tex. Certiorari denied.

No. 87–1083. AVIS RENT-A-CAR OF PUERTO RICO, INC. *v.* MARSHALL ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 828 F. 2d 845.

No. 87–1085. FAITH CHRISTIAN FELLOWSHIP OF MILWAUKEE, INC., AKA WORD ALIVE CHRISTIAN FELLOWSHIP *v.* BOARD OF

ZONING APPEALS OF THE CITY OF MILWAUKEE ET AL. Ct. App. Wis. Certiorari denied.

No. 87–1086. DAMASCUS *v.* BORGIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 87–1087. CELOTEX CORP. *v.* CATRETT, ADMINISTRATRIX OF THE ESTATE OF CATRETT. C. A. D. C. Cir. Certiorari denied. Reported below: 263 U. S. App. D. C. 399, 826 F. 2d 33.

No. 87–1088. CROWDER ET AL. *v.* SOUTHERN BAPTIST CONVENTION ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 828 F. 2d 718.

No. 87–1089. THREE MOVIES OF TARZANA *v.* PACIFIC THEATRES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 828 F. 2d 1395.

No. 87–1090. GOEL ET AL. *v.* ENTRE COMPUTER CENTERS, INC. C. A. 3d Cir. Certiorari denied. Reported below: 829 F. 2d 31.

No. 87–1094. NORTH *v.* WALSH ET AL.; and NORTH *v.* MEESE, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 87–1100. MOZERT ET AL. *v.* HAWKINS COUNTY PUBLIC SCHOOLS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 827 F. 2d 1058.

No. 87–1107. POYSKY, DBA ALASKA TOWING CO., ET AL. *v.* PACIFIC MARINE INSURANCE CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 817 F. 2d 106.

No. 87–1108. VERMEULEN ET AL. *v.* HARDY. Sup. Ct. Ohio. Certiorari denied. Reported below: 32 Ohio St. 3d 45, 512 N. E. 2d 626.

No. 87–1110. YOUNG, ADMINISTRATOR OF THE ESTATE OF YOUNG, ET AL. *v.* ATLANTIC RICHFIELD CO. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 400 Mass. 837, 512 N. E. 2d 272.

No. 87–1113. ROBERTS *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 87–1114. WHITMER *v.* STATE BAR OF ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 154 Ariz. 134, 741 P. 2d 267.

No. 87–1116. ADUDDELL *v.* GAF CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 828 F. 2d 770.

No. 87–1118. BELFIORE, DBA NUTMEG NEWS, ET AL. *v.* NEW YORK TIMES CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 826 F. 2d 177.

No. 87–1121. HOSCH *v.* HOSCH. Ct. App. Ga. Certiorari denied. Reported below: 184 Ga. App. 370, 361 S. E. 2d 686.

No. 87–1126. SPORTS DESIGN & DEVELOPMENT, INC., ET AL. *v.* JAMES HEDDON'S SONS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 828 F. 2d 771.

No. 87–1128. PEABODY COAL CO. *v.* MAURYA. C. A. 6th Cir. Certiorari denied. Reported below: 823 F. 2d 933.

No. 87–1135. CADBY *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 512 So. 2d 987.

No. 87–1136. AMERICAN COMMERCIAL LINES, INC., ET AL. *v.* DAVIS ET UX. C. A. 6th Cir. Certiorari denied. Reported below: 823 F. 2d 1006.

No. 87–1138. AMF TUBOSCOPE, INC. *v.* HOUSTON OIL & MINERALS CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 827 F. 2d 1049.

No. 87–1153. TORRES *v.* ILLINOIS BELL TELEPHONE CO. ET AL. C. A. 7th Cir. Certiorari denied.

No. 87–1172. BEALE *v.* O'NEILL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 826 F. 2d 1062.

No. 87–1181. GAYTON *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 184 Ga. App. 387, 361 S. E. 2d 691.

No. 87–1210. AFFELDT *v.* CARR, MAGISTRATE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO. C. A. 6th Cir. Certiorari denied. Reported below: 827 F. 2d 769.

No. 87–5454. WRENN *v.* GOULD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 816 F. 2d 683.

No. 87–5556. SANTIAGO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 821 F. 2d 168.

No. 87–5557. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 815 F. 2d 309.

No. 87–5672. HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 825 F. 2d 846.

No. 87–5673. BRADY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 819 F. 2d 884.

No. 87–5675. AMER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 824 F. 2d 906.

No. 87–5712. CAULDER *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 500 So. 2d 1362.

No. 87–5715. JOHNSON *v.* RUSSELL, SUPERINTENDENT, LIMA CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied. Reported below: 827 F. 2d 769.

No. 87–5746. SHAW *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 824 F. 2d 601.

No. 87–5760. ROY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 830 F. 2d 628.

No. 87–5773. MYERS-BEY *v.* WOODARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 823 F. 2d 548.

No. 87–5796. MYERS *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 48 Wash. App. 1055.

No. 87–5798. MELTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 815 F. 2d 706.

No. 87–5805. HULSTINE *v.* MORRIS. C. A. 8th Cir. Certiorari denied. Reported below: 819 F. 2d 861.

No. 87–5807. JOHNSON *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 821 F. 2d 510.

No. 87–5817. SBLENDORIO ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 830 F. 2d 1382.

No. 87–5835. GLENN *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 512 So. 2d 223.

No. 87–5852. SALEEM ET AL. *v.* EVANS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 828 F. 2d 773.

No. 87–5878. GRAHAM *v.* WILSON, SUPERINTENDENT, CENTENNIAL CORRECTIONAL FACILITY, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 828 F. 2d 656.

No. 87–5891. SLATER ET UX. *v.* DELAWARE TRUST CO. ET AL. C. A. 3d Cir. Certiorari denied.

No. 87–5923. WOLFEL *v.* HOLBROOK. C. A. 6th Cir. Certiorari denied. Reported below: 823 F. 2d 970.

No. 87–5935. EVERETT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 825 F. 2d 658.

No. 87–5937. SIMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 825 F. 2d 408.

No. 87–5945. EBERHARDT *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 257 Ga. 420, 359 S. E. 2d 908.

No. 87–5947. DAVIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 828 F. 2d 968.

No. 87–5961. LATSHAW *v.* FELDER ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 517 Pa. 594, 535 A. 2d 83.

No. 87–5966. CAMARATA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 828 F. 2d 974.

No. 87–5975. HOWES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 824 F. 2d 973.

No. 87–5996. DAVIS *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 825 F. 2d 799.

No. 87–6001. BASCARO *v.* UNITED STATES DEPARTMENT OF JUSTICE. C. A. 11th Cir. Certiorari denied. Reported below: 829 F. 2d 1131.

No. 87–6013. WARD *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 830 F. 2d 196.

No. 87–6020. PORTER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 831 F. 2d 760.

No. 87–6021. DEAN *v.* GEORGIA DEPARTMENT OF TRANSPORTATION ET AL. C. A. 11th Cir. Certiorari denied.

No. 87–6023. WILSON *v.* DEPARTMENT OF THE AIR FORCE. C. A. Fed. Cir. Certiorari denied. Reported below: 824 F. 2d 980.

No. 87–6030. WILLIAMS *v.* WARDEN, MARYLAND HOUSE OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 831 F. 2d 1058.

No. 87–6032. GOODROE *v.* MAZURKIEWICZ, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW, ET AL. C. A. 3d Cir. Certiorari denied.

No. 87–6033. FLOWERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 832 F. 2d 1265.

No. 87–6034. FEJERAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 87–6036. LINCOLN *v.* ISAAC ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 831 F. 2d 301.

No. 87–6040. FORD *v.* TENNESSEE ET AL. C. A. 6th Cir. Certiorari denied.

No. 87–6041. DEVILLE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 512 So. 2d 428.

No. 87–6042. HERNANDEZ-SEVERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 832 F. 2d 1265.

No. 87–6043. LEE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 2d 304.

No. 87–6045. FAZZINI *v.* BOGAN, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 87–6047. KITLEY *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 827 F. 2d 770.

No. 87–6048. FAVORS *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 833 F. 2d 1012.

No. 87–6050. WILLIAMS *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 829 F. 2d 1123.

No. 87–6051. CHICCO *v.* MARS STORES, INC. C. A. 1st Cir. Certiorari denied.

No. 87–6052. BROWN *v.* WAGONER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 831 F. 2d 301.

No. 87–6055. WILLIAMS *v.* MARSHALL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 831 F. 2d 298.

No. 87–6057. MILLER *v.* MCWHERTER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 831 F. 2d 1064.

No. 87–6058. SPENCER *v.* UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT. C. A. 7th Cir. Certiorari denied.

No. 87–6060. YOUNG *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 821 F. 2d 1133.

No. 87–6061. SCHMID *v.* UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 827 F. 2d 384.

No. 87–6066. HARRISON *v.* BYRD, SHERIFF, ET AL. C. A. 5th Cir. Certiorari denied.

No. 87–6068. DAUM *v.* INDIANA. Sup. Ct. Ind. Certiorari denied.

No. 87–6069. MATTHEWS *v.* BUTLER, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 824 F. 2d 971.

No. 87–6070. WATKINS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 87–6071. VELEZ *v.* UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ET AL. C. A. 5th Cir. Certiorari denied.

No. 87–6072. MARTIN *v.* PENNSYLVANIA BOARD OF LAW EXAMINERS ET AL. C. A. 3d Cir. Certiorari denied.

No. 87–6073. DIXON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 87–6076. HARJO *v.* DUELLO ET AL. Sup. Ct. Okla. Certiorari denied. Reported below: 742 P. 2d 1059.

No. 87–6077. GROFF *v.* TOWNSHIP OF ELIZABETH, LANCASTER COUNTY, PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 516 Pa. 644, 533 A. 2d 715.

No. 87–6078. HAGAN *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 527 A. 2d 1308.

No. 87–6081. EMBREY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 657 F. 2d 273.

No. 87–6082. JOE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 831 F. 2d 218.

No. 87–6083. SMITH, AKA LUMUMBA *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 835 F. 2d 1431.

No. 87–6085. WATSON *v.* GASCONADE COUNTY CIRCUIT COURT ET AL. C. A. 8th Cir. Certiorari denied.

No. 87–6086. LEWIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 87–6088. PARTEE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 157 Ill. App. 3d 231, 511 N. E. 2d 1165.

No. 87–6089. MORRIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 87–6090. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 831 F. 2d 657.

No. 87–6091. WIECZORKOWSKI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 833 F. 2d 1018.

No. 87–6093. RAMOS *v.* HAYMON. C. A. 7th Cir. Certiorari denied. Reported below: 826 F. 2d 1068.

No. 87–6098. CIMISI ET AL. *v.* RUTLEDGE. C. A. 2d Cir. Certiorari denied. Reported below: 823 F. 2d 544.

No. 87–6099. BEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 2d 303.

No. 87–6100. BINDER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 826 F. 2d 1070.

No. 87–6101. FLUDD *v.* UNITED STATES SECRET SERVICE ET AL. C. A. D. C. Cir. Certiorari denied.

No. 87–6102. DAVIS *v.* GARRAGHTY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 831 F. 2d 1057.

No. 87–6103. AVERHART *v.* SHULER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 834 F. 2d 173.

No. 87–6106. ESPENSHADE *v.* PENNSYLVANIA STATE UNIVERSITY ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 516 Pa. 614, 531 A. 2d 780.

No. 87–6107. KEMPER *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 831 F. 2d 301.

No. 87–6111. BERRY *v.* PEACH ET AL. C. A. 8th Cir. Certiorari denied.

No. 87–6112. COPPLE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 827 F. 2d 1182.

No. 87–6114. ANDEREGG, INDIVIDUALLY AND AS NEXT FRIEND OF HOGAN *v.* HIGH STANDARD, INC. C. A. 5th Cir. Certiorari denied. Reported below: 825 F. 2d 77.

No. 87–6120. JANIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 831 F. 2d 773.

No. 87–6121. WASHINGTON *v.* RAFFERTY, SUPERINTENDENT, NEW JERSEY STATE PRISON. C. A. 3d Cir. Certiorari denied. Reported below: 830 F. 2d 23.

No. 87–6122. WYLIE *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 826 F. 2d 1066.

No. 87–6123. CALDWELL *v.* QUARLES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 826 F. 2d 1062.

No. 87–6124. CRAWFORD *v.* FORD, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 87–6126. YORK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 830 F. 2d 885.

No. 87–6128. JOHNSON *v.* NACHMAN ET AL. C. A. 11th Cir. Certiorari denied.

No. 87–6130. BERTRAM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 830 F. 2d 1127.

No. 87–6131. WIGGINS *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 825 F. 2d 1237.

No. 87–6133. MCCLELLAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 742 S. W. 2d 655.

No. 87–6134. LITTLE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 87–6136. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 828 F. 2d 23.

No. 87–6140. PRESTON *v.* GOLDEN STATE FOODS. C. A. 11th Cir. Certiorari denied. Reported below: 835 F. 2d 290.

No. 87–6141. WASHINGTON *v.* ANGELONE ET AL. C. A. 10th Cir. Certiorari denied.

No. 87–6142. ROSENBERG *v.* COMERICA BANK ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 817 F. 2d 757.

No. 87–6143. SMITH *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 831 F. 2d 1068.

No. 87–6144. TYLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 833 F. 2d 310.

No. 87–6146. WRIGHT *v.* GREENE ET AL. Ct. App. Tenn. Certiorari denied.

No. 87–6147. HOLDER *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 153 Ill. App. 3d 884, 506 N. E. 2d 407.

No. 87–6148. RODGER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 87–6149. MANGONE *v.* JUDGES OF THE COMMONWEALTH COURT OF PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 835 F. 2d 283.

No. 87–6152. GOOCH *v.* BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 833 F. 2d 589.

No. 87–6153. POPE *v.* GRAMMER, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 837 F. 2d 478.

No. 87–6156. NOTT ET AL. *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 829 F. 2d 1127.

No. 87–6157. LOVE *v.* PAHL, TRUSTEE, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 829 F. 2d 1120.

No. 87–6160. PINO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 834 F. 2d 1026.

No. 87–6161. TEMPEL *v.* ALASKA ET AL. C. A. 9th Cir. Certiorari denied.

No. 87–6163. SMITH *v.* CITY OF CHESAPEAKE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 816 F. 2d 673.

No. 87–6165. HIGDON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 832 F. 2d 312.

No. 87–6166. LASHLEY ET UX. *v.* FIRST NATIONAL BANK OF LIVE OAK. C. A. 11th Cir. Certiorari denied. Reported below: 825 F. 2d 362.

No. 87–6167. COOLEY *v.* KOEHLER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 87–6169. ALMAHDI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 823 F. 2d 545.

No. 87–6171. PAIGE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 87–6175. HILL *v.* MCDERMOTT, INC. C. A. 5th Cir. Certiorari denied. Reported below: 827 F. 2d 1040.

No. 87–6178. PAGE *v.* ALASKA. Ct. App. Alaska. Certiorari denied.

No. 87–6179. QUEENAN *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 158 Mich. App. 38, 404 N. W. 2d 693.

No. 87–6180. QUEENAN *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 158 Mich. App. 38, 404 N. W. 2d 693.

No. 87–6181. OLIM *v.* OKLAHOMA DEPARTMENT OF PUBLIC SAFETY. C. A. 10th Cir. Certiorari denied.

No. 87–6182. LEMONS *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 833 F. 2d 1007.

No. 87–6184. COLE *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied. Reported below: 830 F. 2d 104.

No. 87–6188. TOWNES *v.* CHEVRON GULF CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 836 F. 2d 547.

No. 87–6191. FERNG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 2d 304.

No. 87–6192. GOMEZ-VIGIL, AKA DIA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 833 F. 2d 1014.

No. 87–6199. BARATA-JIMENEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 835 F. 2d 875.

No. 87–6200. DREER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 831 F. 2d 1069.

No. 87–6201. THOMAS *v.* RAFFERTY, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 833 F. 2d 307.

No. 87–6202. CHASE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 833 F. 2d 1017.

No. 87–6205. WATSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 87–6206. HOLZER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 828 F. 2d 21.

No. 87-6207. MEHAR *v.* C & P TELEPHONE COMPANY OF MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 838 F. 2d 467.

No. 87-6213. HAGEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 831 F. 2d 298.

No. 87-6215. WOOD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 831 F. 2d 298.

No. 87-6221. GIBSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 834 F. 2d 1026.

No. 87-6222. KINGSTRO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 834 F. 2d 1023.

No. 87-6226. VANDERBERG *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 832 F. 2d 1265.

No. 87-6239. GARRETT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 833 F. 2d 1017.

No. 87-6245. CABEZAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 834 F. 2d 1023.

No. 87-6246. CRUZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 834 F. 2d 47.

No. 87-6261. LEDESMA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 833 F. 2d 1019.

No. 87-6269. ACEVES-ROSALES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 832 F. 2d 1155.

No. 87-6271. BUCHANAN *v.* COUNTY OF JEFFERSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 826 F. 2d 1062.

No. 87-6281. HARPER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 836 F. 2d 1345.

No. 87-576. SHINTAKU ET AL. *v.* COWAN. Sup. Ct. Haw. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 87-718. DUGGER, SECRETARY, FLORIDA OF CORRECTIONS *v.* CHRISTOPHER. C. A. 11th Cir. Motion of respondent for

leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 824 F. 2d 836.

No. 87–1161. ILLINOIS *v.* KIRKPATRICK. App. Ct. Ill., 1st Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 153 Ill. App. 3d 1158, 517 N. E. 2d 351.

No. 87–752. LIGHTNER, DBA LIGHTNER AUTO SALES *v.* JONES ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 820 F. 2d 818.

No. 87–907. LARM ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 824 F. 2d 780.

No. 87–1098. LAKE HAVASU CITY, ARIZONA *v.* RANCHO DISPOSAL SERVICE, INC. C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 818 F. 2d 869.

No. 87–988. KASPER *v.* FEDERAL NATIONAL MORTGAGE ASSOCIATION. C. A. 11th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 823 F. 2d 451.

No. 87–997. MARTIN, TRUSTEE *v.* FIRST NATIONAL BANK OF LOUISVILLE, KENTUCKY. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 829 F. 2d 596.

No. 87–1109. HALVORSEN *v.* FERGUSON & BURDELL ET AL. C. A. 8th Cir. Petition for writ of certiorari and/or mandamus denied.

No. 87–1131. PINHAS *v.* SUMMIT HEALTH, LTD., ET AL. C. A. 9th Cir. Certiorari before judgment denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 87–1170 (A–372). O'REAR *v.* ATTORNEY GENERAL OF WISCONSIN. C. A. 7th Cir. Application for certificate of probable cause, addressed to JUSTICE BRENNAN and referred to the Court, denied. Certiorari denied.

No. 87–5575. MAYS *v.* TEXAS. Ct. Crim. App. Tex.;

No. 87–5717. GRIFFIN *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir.;

No. 87–5799. MACIAS *v.* TEXAS. Ct. Crim. App. Tex.;

No. 87–5873. WILSON *v.* BUTLER, WARDEN. C. A. 5th Cir.;

No. 87–5989. DRAYTON *v.* SOUTH CAROLINA. Sup. Ct. S. C.;

No. 87–6014. SHURN *v.* ILLINOIS. Sup. Ct. Ill.;

No. 87–6019. STUMPF *v.* OHIO. Sup. Ct. Ohio;

No. 87–6044. DIAZ *v.* FLORIDA. Sup. Ct. Fla.;

No. 87–6132. FORD *v.* ALABAMA. Sup. Ct. Ala.; and

No. 87–6172. JENNINGS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 87–5575, 726 S. W. 2d 937; No. 87–5717, 823 F. 2d 856; No. 87–5799, 733 S. W. 2d 192; No. 87–5873, 813 F. 2d 664 and 825 F. 2d 879; No. 87–5989, 293 S. C. 417, 361 S. E. 2d 329; No. 87–6014, 117 Ill. 2d 317, 512 N. E. 2d 1183; No. 87–6019, 32 Ohio St. 3d 95, 512 N. E. 2d 598; No. 87–6044, 513 So. 2d 1045; No. 87–6132, 515 So. 2d 48; No. 87–6172, 512 So. 2d 169.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 87–5655. CORLEY *v.* MEESE, ATTORNEY GENERAL OF THE UNITED STATES. Ct. App. D. C. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this petition.

No. 87–6127. POST *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 32 Ohio St. 3d 380, 513 N. E. 2d 754.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

I

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231–241 (1976) (MARSHALL, J., dissenting), I would vacate the judgment of the Ohio Supreme Court insofar as it left undisturbed the sentence of death imposed in this case.

II

Even if I did not hold this view, I would vacate petitioner's sentence because it was imposed under the same circumstances this Court recently condemned in *Booth* v. *Maryland*, 482 U. S. 496 (1987). In *Booth*, the Court invalidated a Maryland statute that required the sentencer in a capital case to consider information contained in a "victim impact statement." The statement was prepared by the Maryland State Division of Parole and Probation, and it described the emotional impact of the crime on the victim's family members as well as their opinions of the offense, the offender, and the appropriate punishment. This Court held that such information is irrelevant to a capital sentencing decision and that its admission creates a constitutionally impermissible risk that the jury will impose the death penalty in an arbitrary manner. We concluded that the introduction of such evidence is inconsistent with the reasoned decisionmaking required in capital cases.

In the instant case, petitioner Ronald Ray Post entered a plea of no contest to charges of aggravated murder and aggravated robbery arising out of the killing of a motel desk clerk during an armed robbery of the motel. A three-judge panel convicted petitioner on all counts and convened a sentencing hearing. At the sentencing hearing, the panel received a presentence report prepared by the county department of probation that contained a victim impact statement. In addition, the victim's son testified orally to the panel regarding the effect of the murder on the victim's family and urged the panel to return a sentence of death. The panel found one aggravating circumstance—that the murder was committed during the course of an armed robbery—and no mitigating circumstances; it therefore sentenced petitioner to death.

The Ohio Supreme Court affirmed petitioner's sentence on appeal, rejecting petitioner's argument that his sentence must be vacated because it was imposed in violation of *Booth* v. *Maryland*, *supra*. 32 Ohio St. 3d 380, 513 N. E. 2d 754 (1987). The court recognized that the admission of the written victim impact statement and the oral testimony of the victim's son was error under both Ohio law and the federal constitutional analysis of *Booth*. But the court concluded that the error was not prejudicial

because the sentencer was a three-judge panel rather than a jury. Citing a pre-*Booth* Ohio case, the court invoked the presumption that judges consider only relevant evidence and found that a court's capital sentencing decision must stand absent an indication that the court "was influenced by or considered" victim impact evidence in arriving at its decision. 32 Ohio St. 3d, at 384, 513 N. E. 2d, at 759. Observing that the panel's written opinion mentioned the victim impact evidence but did not cite it as a basis for its decision, the court concluded that petitioner's sentence could stand. *Ibid.*

The reasoning of the Ohio Supreme Court is flatly inconsistent with both the holding and the reasoning of this Court's decision in *Booth*. The Maryland statute considered in *Booth* required that victim impact evidence be considered by *both* courts and juries.* This Court's complete invalidation of that statute in no way distinguished or preserved a question as to nonjury sentencings. Moreover, in *Booth*, both the Maryland Court of Appeals and the State in its argument to this Court relied primarily on a prior Maryland case in which the capital sentencer was a judge. See *Lodowski* v. *State*, 302 Md. 691, 490 A. 2d 1228 (1985). This Court noted that argument and cited *Lodowski* in *Booth* without according any relevance to the identity of sentencer. See *Booth* v. *Maryland*, *supra*, at 506–507, n. 9. Furthermore, the reasoning of the *Booth* opinion made clear that the result in that case did not require a showing that the victim impact evidence actually "influenced" the sentencer. Rather, the Court expressly stated that the victim impact evidence was inadmissible because it created "a constitutionally unacceptable *risk*" that the sentencer would impose the death penalty in an arbitrary manner. 482 U. S., at 503 (emphasis added). Indeed, the Court summarized its holding by stating: "We conclude that *the introduction* of a [victim impact statement] at the sentencing phase of a capital murder trial violates the Eighth Amendment . . . ." *Id.*, at 509 (emphasis added). The Ohio Supreme Court could have reached its conclu-

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*The Maryland statute read in relevant part:

"In any case in which the death penalty is requested . . . a presentence investigation, including a victim impact statement, shall be completed by the Division of Parole and Probation, and shall be considered by *the court or jury* before whom the separate sentencing proceeding is conducted . . . ." Md. Ann. Code, Art. 41, § 4–609(d) (1957) (emphasis added).

sion only be ignoring these significant aspects of this Court's decision in *Booth*.

I am mindful of the established presumption that judges are able to distinguish between relevant and irrelevant evidence. There is every indication in this case, however, that the three-judge panel failed to make any such distinction. The panel's written opinion explicitly notes that it "considered" the presentence report submitted to it, which contained the victim impact statement, and that it "heard" the statement of the victim's son. App. to Pet. for Cert. 39, 40. At no point either at the hearing or in its opinion did the panel demonstrate any awareness that such evidence was inadmissible under state law or prohibited by the Federal Constitution. More important, the presumption that judges know and apply the rules of evidence should not be converted into license to conclude that judges are inhuman, incapable of being moved by passion as well as by reason. It would be unrealistic and unwise to presume that no judge could be moved, in both heart and deed, by the anguish and rage expressed by a murder victim's family. The potentially inflammatory effect of such evidence convinced this Court in *Booth* that its admission endangered the reasoned decisionmaking required in capital cases. In the instant case, in which the evidence took the form of personal testimony as well as third-person, written description, there is no reason to denigrate that danger simply because the recipients of the evidence wore judicial robes.

The Ohio Supreme Court's decision in this case threatens to undermine both the holding and the reasoning of this Court's decision in *Booth*. The Court should grant certiorari in order to preserve the integrity of its recent pronouncement. I dissent.

Rehearing Denied

No. 85–673. HARTIGAN, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, ET AL. *v.* ZBARAZ ET AL., *ante*, p. 171;

No. 86–1415. MARINO ET AL. *v.* ORTIZ ET AL.; and COSTELLO ET AL. *v.* NEW YORK CITY POLICE DEPARTMENT ET AL., *ante*, p. 301;

No. 86–7032. WASHINGTON *v.* DEPARTMENT OF THE ARMY, *ante*, p. 985;

No. 87–115. OLAVARRIETA *v.* UNITED STATES ET AL., *ante*, p. 851;

No. 87-131. SIERRA CLUB *v.* SHELL OIL CO. ET AL., *ante*, p. 985;

No. 87-302. AQUARIAN FOUNDATION ET AL. *v.* LAW OFFICES OF EDWARDS & BARBIERI, *ante*, p. 892;

No. 87-409. BUDINSKY, TDBA COLPAT MINE *v.* PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES ET AL., *ante*, p. 926;

No. 87-531. ASAM *v.* LEE COUNTY DISTRICT SCHOOL BOARD ET AL., *ante*, p. 951;

No. 87-674. MIHALEK CORP. ET AL. *v.* MICHIGAN ET AL., *ante*, p. 986;

No. 87-685. CITY OF PAGEDALE, MISSOURI *v.* HARRIS ET AL., *ante*, p. 986;

No. 87-5197. ATAMIAN *v.* RUBIN ET AL., *ante*, p. 864;

No. 87-5477. ANA LEON T. *v.* FEDERAL RESERVE BANK OF CHICAGO ET AL., *ante*, p. 945;

No. 87-5708. BENOIT *v.* CITY POLICE DEPARTMENT OF CROWLEY, LOUISIANA, ET AL., *ante*, p. 988;

No. 87-5724. MARTIN *v.* PEREZOUS ET AL., *ante*, p. 1013;

No. 87-5841. HENRY *v.* ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER AT GRATERFORD, ET AL., *ante*, p. 1016; and

No. 87-5903. MOYA-GOMEZ *v.* WISCONSIN, *ante*, p. 999. Petitions for rehearing denied. JUSTICE KENNEDY took no part in the consideration or decision of these petitions.

AMENDMENTS OF RULES OF THIS COURT

ORDER

It is ordered that Rule 35.3 of the Rules of the Supreme Court of the United States be amended to read as follows:

> "35.3. A reply brief will be received within 30 days after the filing of the brief for the appellee or respondent, or not later than one week before the date of oral argument, whichever is earlier, and only by leave of Court thereafter."

The foregoing amendment shall become effective immediately, except that in a case in which the brief for the appellee or respondent has already been filed, a reply brief will be received within 30 days of this order, or not later than one week before the date of oral argument, whichever is earlier.

DECEMBER 8, 1987

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